

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

- - - - -
Coordination Proceeding)
Special Title (Rule 1550(b)).)
In re TOBACCO CASES II)
This Document Relates to:)
) JCCP No. 4042
The People of the State of)
California, and American) VIDEOTAPED
Environmental Safety Institute) DEPOSITION OF
v. Philip Morris Incorporated,)
et al., Los Angeles Superior) NED F. ROSCOE
Court, Case No. BC 194217)
The People of the State of)
California, City of San Jose,)
and Paul Dowhall v. Brown &)
Williamson Corp., et al., San)
Francisco Superior Court, Case)
No. 996781)
)
SERVICE LIST "B")
- - - - -

TAKEN ON: Friday, July 7, 2000

TAKEN AT: 401 B Street, Suite 1700
San Diego, California

REPORTED BY: Jeannette K. Jessup
CSR No. 8573, RPR

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1 C E R T I F I C A T E

2 I, the undersigned, do hereby certify that I have read
3 the foregoing deposition and that, to the best of my
knowledge, said deposition is true and accurate (with the
exception of the following changes listed below):

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27

NED F BOSCOE

28

6

1 SAN DIEGO, CALIFORNIA; FRIDAY, JULY 2, 2000; 9:05 A.M.

3

4

5 taken in the matter of State of California in the County
6 of San Diego. The case is State of California and the
7 City of San Jose in re: Tobacco Cases II. It's Case
8 JCCP 4042. It's being held at Gray, Cary, 401 B Street,
9 18th Floor, in San Diego. Today's date is Friday, July
10 7th, 2000. And the time is 9:13 a.m. My name is
11 Christian Teare. I'm from the firm of AJL Videotaping
12 Services, 1919 Grand Avenue, Suite 2-C in San Diego. The
13 certified shorthand reporter is Jeannette Jessup in
14 association with Vail, Christians & Associates in San
15 Diego.

16

17 at all times during this deposition unless counsel have
18 specifically requested to go off the record. If counsel
19 would please state their appearances, the reporter will
20 swear in the witness.

21

22

23

ary

6

24 MR. BERN: Martin Bern of Munger, Tolles & Olson
25 for Philip Morris, Incorporated.
26 MR. EATON: Dan Eaton of Seltzer, Caplan also
27 for Philip Morris, Incorporated.
28 ////

7

1 NED F. ROSCOE,
2 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:
3

4 EXAMINATION BY MR. HULBURT:

5 Q. Sir, will you please give us your full name and
6 spell it for the record.

7 A. My name is Ned Fenton Roscoe. N-e-d,
8 F-e-n-t-o-n, R-o-s-c-o-e.

9 Q. Have you ever given a deposition before?

10 A. Yes, I have.

11 Q. How many times?

12 A. I don't remember.

13 Q. Can you give me your best estimate.

14 A. Probably 15 to 20 times.

15 Q. All right. So are you familiar with the process
16 we're going to go through this morning?

17 A. Yes.

18 Q. All right. I'll just repeat a couple of the
19 things that you already know, I'm sure. And that is, of
20 course, that the oath the court reporter just
21 administered to you is the same oath you would take as if
22 you were testifying in a courtroom with a judge and a
23 jury and all the formalities that go with it. You
24 understand that?

25 A. Yes.

26 Q. It has the same potential penalties of perjury
27 if for some reason your testimony is proven to be false.
28 Do you understand that?

8

1 A. Yes.

2 Q. And for that reason it's important that your
3 testimony be as accurate as possible so we don't create
4 any unintentional confusion or inconsistencies or
5 controversy in your testimony. And one way to ensure
6 that is to make sure that you always fully understand the
7 question before you answer. So I want to encourage you,
8 ask you, invite you to let me know at any time if you
9 don't fully understand my question. All right?

10 A. Thank you.

11 Q. If you do that, I'll rephrase it, do my best to
12 ask it again, or use other words or do whatever I can do
13 to help you understand. Otherwise, if you answer the
14 question, I'm always assuming that you fully understood
15 it, otherwise you never would have answered. Do you
16 understand that?

17 A. Yes.

18 Q. Okay. And is there anything that you're aware
19 of today that might affect your ability to give your best
20 and most accurate testimony? Sometimes fatigue, illness,
21 medication or anything else that might be affecting you
22 today.

23 A. No. I would have liked to have different
24 donuts.

25 Q. All right. You think that will not impact your
26 testimony then?

27 MR. KAMMER: I'll mention that to Brian.

28 THE WITNESS: I like the sugar ones.

1 BY MR. HULBURT:

2 Q. All right. If -- if at any time you need to
3 take a break to get more sugar, we can take a break. Do
4 you understand that?

5 A. Yes.

6 Q. Okay. Now, what is your position with
7 Cigarettes Cheaper?

8 A. I am president of Cigarettes Cheaper.

9 Q. In -- in some of the documents that you're --
10 that you've provided or through your attorneys you've
11 provided this lawsuit I read something suggesting that
12 there are five presidents of Cigarettes Cheaper; is that
13 correct?

14 A. Yes.

15 Q. And -- and so how does that work? Are the five
16 equal, or do they rotate through the position of
17 president? Or tell me what it means to be a president at
18 Cigarettes Cheaper.

19 A. Well, we have meetings each Saturday. And every
20 quarter we switch who runs the meeting. My quarter just
21 started. We all sign documents. Although, I sign the
22 bulk of the documents. The other presidents are all my
23 family members. And so, of course, my father is the
24 first among equals.

25 Q. Okay. Who are the five presidents?

26 A. Mark Baldwin, Sally Baldwin, Marilyn Roscoe,
27 John Roscoe, Ned Roscoe.

28 Q. And can you explain to me the relationships

10

1 then.

2 A. Yes.

3 Q. What are the relationships?

4 A. John Roscoe is my father. Marilyn Roscoe is my
5 mother. Sally Baldwin is my sister. Mark Baldwin is her
6 husband.

7 Q. I understand that you've been designated by the
8 company as the person most knowledgeable regarding a
9 number of items that are in the deposition notice. Did
10 you review the deposition notice?

11 A. Yes.

12 Q. And did you determine that you are the person
13 most knowledgeable regarding each of the items in the
14 notice?

15 A. Yes.

16 Q. And did -- did the other four presidents agree
17 with that?

18 A. Yes.

19 Q. Okay. I want to say then why, why are you the
20 one of the five that is the person most knowledgeable
21 regarding those items?

22 A. Most of us have about equal knowledge. I was
23 the person that got the deposition notice.

24 Q. Okay. So is it your perspective that any one of
25 the five of you could have given the same information
26 that you'll be able to give today?

27 A. Yes.

28 Q. Why was it decided then that you be the one to

11

1 testify?

2 A. I got the deposition -- I got the notice first.
3 And so we needed someone to testify. I said, "Okay.
4 I'll do it."

5 Q. What do you mean you got it first? You mean you
6 -- you got the mail first you mean?
7 A. Yes.
8 Q. Okay. And have there been any other lawsuits
9 involving Cigarettes Cheaper which have similarly
10 requested a person most knowledgeable?
11 A. Yes.
12 Q. And have you always been the one who's selected
13 to be the one to testify?
14 A. No.
15 Q. Who else has testified as a person most
16 knowledgeable for Cigarettes Cheaper?
17 A. Bob Mazur, John Roscoe, Jay Chapman.
18 Q. How do you spell Mazur for Bob Mazur?
19 A. M-a-z-u-r.
20 Q. Who is Bob Mazur?
21 A. Bob Mazur is an accountant.
22 Q. Who's Jay Chapman?
23 A. Jay is in charge of bureaucratic interfacing.
24 Q. What does that mean?
25 A. Means interfacing with bureaucrats.
26 Q. Bureaucrats being government agencies?
27 A. Yes.
28 Q. Is Cigarettes Cheaper a corporation?

12

1 A. Yes.
2 Q. Is that the name of the corporation?
3 A. Yes.
4 Q. What is -- is it Cigarettes Cheaper, Inc., or
5 what is the correct name of Cigarettes Cheaper?
6 A. C-i-g-a-r-e-t-t-e-s space c-h-e-a-p-e-r,
7 exclamation point.
8 Q. Okay. And where is it incorporated?
9 A. California.
10 Q. And what is the business of Cigarettes Cheaper?
11 A. We serve citizens who smoke.
12 Q. In what way? How do you serve them?
13 A. We sell them cigarettes at retail.
14 Q. Does Cigarettes Cheaper do anything other than
15 that?
16 A. Yes.
17 Q. What else does Cigarettes Cheaper do?
18 A. Occasionally we waste time in unproductive
19 exercises.
20 Q. Like what?
21 A. This case.
22 Q. What else does Cigarettes Cheaper do?
23 A. Just about everything else relates to serving
24 citizens who smoke.
25 Q. Does Cigarettes Cheaper sell products other than
26 tobacco products?
27 A. Yes.
28 Q. Like what?

13

1 A. Gum, mints, lighters, ashtrays, books.
2 Q. Anything else?
3 A. I think that's it.
4 Q. Okay. How many stores does Cigarettes Cheaper
5 have in California?
6 A. I don't know.
7 Q. Can you give me your best estimate?
8 A. Yes.
9 Q. What is it?

10 A. 242.
11 Q. How many stores does Cigarettes Cheaper have
12 total?
13 A. We have 679 stores ringing sales today.
14 Q. In how many states?
15 A. 21.
16 Q. What is the business address for Cigarettes
17 Cheaper? Where is it located?
18 A. 4457 Park Road in beautiful Benicia, California,
19 94510.
20 Q. Is that where your office is?
21 A. Yes.
22 Q. Can you give me a -- a sort of hierarchy of the
23 company. I have the five of you as the presidents. And
24 then I'd like to either go from the bottom up or go from
25 the top down and create sort of a -- a company structure.
26 A. Yes.
27 Q. All right. Will you do that, please.
28 A. Yes.

14

1 Q. You said you would do that.
2 A. Yes. Would you please rephrase the question.
3 Q. Yes. Could you give me the corporate structure
4 either from the top down or from the bottom up, whichever
5 is most convenient for you?
6 A. Yes.
7 Q. Please do it now.
8 A. Customers come in to our stores and they are
9 served by managers and assistant managers. The managers
10 and assistant managers report to and get direction from
11 district managers. District managers report to and get
12 direction from section managers. Section managers report
13 to and get direction from region managers. All of the
14 managers, district managers, section managers and region
15 managers, are served by staff at the office, by drivers
16 who deliver product, and depot supervisors who supervise
17 drivers. At the office there are a variety of standard
18 departments, accounting, data processing, personnel. And
19 the region managers report to Mark Baldwin. The
20 accountants report to the five presidents. The data
21 processing folks report to me. There's a few secretarial
22 people. And they report to whatever department they're
23 in.
24 Q. What sort of territory does a district manager
25 cover?
26 A. He'll cover -- would you please --
27 Q. I'm trying to understand the -- the territory or
28 jurisdiction of a district manager.

15

1 A. The jurisdiction will be 10 to 25 stores.
2 Q. All right. And same question for a section
3 manager. What -- what territory do they have?
4 A. Usually will be several states.
5 Q. How many sections are there for California?
6 A. I believe there are three. No. I think there's
7 four.
8 Q. Do the California sections -- any of the
9 California sections include other states?
10 A. Yes.
11 Q. Tell me about that. Tell me about the four
12 California sections. Can you tell me what territory they
13 cover.
14 A. Idaho, the lady in Santa Barbara also covers the

15 Idaho stores. Guy in Santa Rosa also covers Nevada. The
16 man in San Diego also covers part of Arizona. And I
17 think the lady in Los Angeles covers Los Angeles.

18 Q. Okay. And then what territory does a region
19 manager have?

20 A. Be a group of states. Western United States.

21 Q. All right. And then if all the managers are
22 reporting or could potentially report to Mark Baldwin, in
23 what capacity is Mark Baldwin then dealing with these
24 managers?

25 A. He's called the director of operations.

26 Q. Okay. What does that mean? What's his role or
27 responsibility as the director of operations?

28 A. We hold him responsible for the financial

16

1 results of the stores and for the direction of the folks,
2 the care and feeding of the employees.

3 Q. Are there other positions that you call director
4 positions similar to Mark Baldwin being the director,
5 director of operations?

6 A. No, not that I can think of.

7 Q. So you indicated that the data processing people
8 report to you?

9 A. That's correct.

10 Q. In -- in what capacity are you the person
11 responsible for data processing?

12 A. Well, I hire and fire the programmers and the
13 people who work in data processing.

14 Q. The data that's being processed is data
15 regarding sales? Is that what you're talking about?

16 A. Yes.

17 Q. Is there a person at Cigarettes Cheaper who is
18 most frequently the one having contact with the tobacco
19 companies?

20 A. Yes.

21 Q. Who is that?

22 A. Me.

23 Q. Okay. Would you be the one on behalf of
24 Cigarettes Cheaper then who is primarily negotiating the
25 various contracts and retail display agreements with the
26 tobacco companies?

27 A. Yes.

28 Q. You mentioned depots and depot supervisors.

17

1 What's a depot at Cigarettes Cheaper?

2 A. A depot is a location where we receive
3 cigarettes and then ship them out to stores.

4 Q. Does Cigarettes Cheaper obtain its cigarettes
5 direct from the manufacturers?

6 A. Yes.

7 Q. Does it also obtain cigarettes from other
8 distributors?

9 A. Yes.

10 Q. Which manufacturers sell cigarettes direct to
11 Cigarettes Cheaper?

12 A. Bailey Tobacco, Tabacalera, which is now called
13 Altadis.

14 Q. How do you spell that?

15 A. A-l-t-a-d-i-s.

16 Q. Any others that provide direct to Cigarettes
17 Cheaper?

18 A. Yes.

19 Q. What are they?

20 A. Imperial. That's all I recall at this time.
21 Q. Where does Cigarettes Cheaper obtain its other
22 brands?
23 A. From McClane.
24 Q. McClane?
25 A. Yes.
26 Q. How do you spell that?
27 A. M-c capital L-a-n-e.
28 Q. Where is McClane located?

18

1 A. McClane is located across the country.
2 Q. Is it called McClane something, or is it just
3 called McClane?
4 A. I think it's called McClane Company.
5 Q. Does Cigarettes Cheaper obtain all of the
6 cigarette brands from McClane Company other than Bailey,
7 Altadis and Imperial?
8 A. Could you please rephrase the question.
9 Q. Yeah. Other than Bailey, Altadis and Imperial,
10 does Cigarettes Cheaper get all of its cigarettes from
11 McClane Company?
12 A. At this point that is correct.
13 Q. How long has that been true?
14 A. Since for the last nine months.
15 Q. Okay. And what was different before that?
16 A. We purchased some cigarettes that had been
17 reimported into the United States.
18 Q. Which -- what kind of cigarettes were those?
19 A. Camel, Winston, More, Salem.
20 Q. How long or during what period of time were you
21 doing that?
22 A. Could you be more specific.
23 Q. Yes. During what period of time were you
24 repurchasing cigarettes that had been reimported?
25 A. From April of 1999 to about August of 1999.
26 1998 to 1999.
27 Q. April '98 to August '99?
28 A. That's correct.

19

1 Q. So explain to me what that means, to repurchase
2 cigarettes that have been reimported into America.
3 A. Do you mean to purchase cigarettes?
4 Q. I mean reimported.
5 MR. EATON: No, but I think you're saying
6 repurchase, and I don't think he ever used that term. He
7 used purchased reimported cigarettes.
8 MR. HULBURT: Okay. Got too many re's.
9 MR. EATON: That's right.
10 MR. HULBURT: All right.
11 BY MR. HULBURT:
12 Q. Explain to me what it means then to purchase
13 reimported cigarettes.
14 A. Cigarettes on the world market are sold at a
15 different price than they are sold domestically. During
16 that period we purchased cigarettes that had been
17 exported from the United States and then brought back
18 into the United States.
19 Q. And who did you purchase them from?
20 A. Two firms. CPI and Delta Ozark.
21 Q. Why did you stop doing that in August 1999?
22 A. Various states had passed laws banning the sale
23 of reimported cigarettes.
24 Q. Is this sale of reimported cigarettes banned in

25 California to your understanding?
26 MR. BERN: Objection; calls for a legal
27 conclusion.
28 MR. EATON: Join.

20

1 THE WITNESS: It is not banned in California.
2 Although, it is illegal to apply a California tax stamp
3 to reimported product.

4 BY MR. HULBURT:

5 Q. So how was Cigarettes Cheaper handling the tax
6 stamps when it was reimporting the cigarettes?

7 A. We are applying the tax stamps to the product.

8 Q. Did any bureaucrats suggest to Cigarettes
9 Cheaper that it stop the practice of reimporting
10 cigarettes?

11 A. Yes.

12 Q. From what agency or what -- what department?

13 A. California -- no. The Arizona Department of
14 Revenue.

15 Q. How about from California? Was there any
16 government involvement at all in the encouraging
17 Cigarettes Cheaper to stop reimporting cigarettes for
18 sale in California?

19 A. Yes.

20 Q. From what agency?

21 A. The California legislature and the California
22 governor.

23 Q. In what way?

24 A. A law was passed banning the application of
25 stamps to reimported products.

26 Q. When was that?

27 A. Sometime in 1999.

28 Q. When you were reimporting Camel, Winston, More,

21

1 and Salem, was R.J. Reynolds aware of that?

2 A. I don't know.

3 Q. Did R.J. Reynolds have any communication with
4 Cigarettes Cheaper regarding Cigarettes Cheaper practice
5 of reimporting cigarettes?

6 A. I'd like to go back to my previous answer and
7 correct it. Yes, R.J. Reynolds did know that we were --
8 were selling reimported product.

9 Q. Okay. And did R.J. Reynolds complain about
10 that, or they were okay with that, or what was its
11 communication to you regarding your practice?

12 MR. BERN: Objection; compound.

13 MR. KAMMER: You may answer.

14 THE WITNESS: R.J. Reynolds sued us.

15 BY MR. HULBURT:

16 Q. Is that lawsuit ongoing?

17 A. Yes.

18 Q. Where is that pending?

19 A. In Chicago.

20 Q. Can you -- can you tell me the basis of the
21 claim or R.J. Reynolds' basic allegation against
22 Cigarettes Cheaper in that lawsuit.

23 A. Yes.

24 Q. What is it?

25 A. That reimporting -- selling reimported
26 cigarettes is a violation of the Lanham Act.

27 Q. And can you tell me the basic position of
28 Cigarettes Cheaper in response to the claim?

22

1 A. Yes.
2 Q. What is that?
3 A. Bologna.
4 MR. KAMMER: Good legal phrase.
5 BY MR. HULBURT:
6 Q. Was it -- during the time that Cigarettes
7 Cheaper was reimporting cigarettes, was it your
8 understanding that the cigarettes were identical to the
9 same brand cigarettes that you would purchase in America?
10 A. No.
11 Q. What was your understanding as to what was
12 different?
13 A. My understanding is that the quality of the
14 tobacco was a little bit better on the reimported product
15 and that the packaging was different.
16 Q. Quality being better in what way? What -- what
17 quality are you describing?
18 A. In the world of tobacco different leaves have
19 different qualities based on where they're grown and the
20 position of the plant and the care that the farmer takes
21 with it. Different tobacco sell for different prices.
22 It's my belief that the tobacco used for product that's
23 sold overseas is sometimes of higher quality.
24 Q. All right. Other than this period of time where
25 Cigarettes Cheaper was reimporting some R.J. Reynolds
26 cigarettes, is McClane Company -- strike that.
27 Other than the time that you were reimporting
28 and other than Bailey, Altadis and Imperial, is McClane

23

1 Company the supplier of all the tobacco products that
2 Cigarettes Cheaper sells?
3 A. I don't believe that I testified that we
4 reimported cigarettes.
5 Q. What were you doing then between April '98 and
6 August '99?
7 A. Do you mean what was I doing in regards to
8 reimported cigarettes?
9 Q. Right.
10 A. Cigarettes Cheaper purchased reimported
11 cigarettes.
12 Q. You weren't doing the importing?
13 A. That is correct.
14 Q. Okay. So other than purchasing those reimported
15 cigarettes, and other than Bailey, Altadis and Imperial,
16 is McClane Company the supplier of all the cigarettes
17 sold at Cigarettes Cheaper?
18 A. Yes.
19 Q. And how long has that been true?
20 A. Three years, seven months.
21 (Whereupon, the following testimony is deemed
22 confidential material and subject to protective order
23 entered by the Superior Court of the County of Los
24 Angeles, State of California and is bound separately.)
25 ////
26 ////
27 ////
28 ////

24

1 BY MR. HULBURT:
2 Q. What does Cigarettes Cheaper do to prevent
3 minors from entering the stores?
4 A. We have several signs on the front area that say
5 "minors prohibited by law" or "no minors" or offering a

6 reward to people who see a minor going into a store.
7 Once into the store, we have ropes and stanchions set up
8 to where customers must go by the register. There's a
9 sign that says that -- that if you're under 27, you must
10 show your I.D. to come in. And the managers are trained
11 and check to make sure that they actually do check I.D.
12 for people before they go into stores.

13 Q. How long has that practice of checking the I --
14 the practice with the ropes and the stanchions and
15 running the customer past the counter first, how long has
16 that been the practice at Cigarettes Cheaper?

17 A. We've been doing it for at least a year in some
18 stores.

19 Q. How long has it been the practice in California?

20 A. We've been doing it at least a year in some
21 stores.

22 Q. Is that a practice in place in all stores now?

23 A. Yes.

24 Q. How do you describe a Cigarettes cheeker --
25 Cigarettes Cheaper store to someone? Someone who's never
26 been in one of your stores, how would you describe it?

27 A. This is a hypothetical question. I'm going to
28 need more information in order to answer it.

29

1 Q. Well, the scenario is that somebody who's never
2 been into one of your stores asks you to describe it.
3 What's it like?

4 A. Could you please give me more specifics to
5 complete this hypothetical.

6 Q. Like what? What do you need?

7 A. Who is the person that's asking me the question?

8 Q. Say it's a judge.

9 A. What kind of judge?

10 Q. A judge that will decide whether Cigarettes
11 Cheaper is liable or not.

12 A. Liable for what?

13 Q. Liable for a violation of 17200 in this lawsuit.

14 A. What is 17200?

15 Q. Do you need to know that to know how to describe
16 the store?

17 A. Yes.

18 Q. Why?

19 A. Because when people want to know what the store
20 is, they're usually keyed into certain important things.
21 And it's important to have some feeling of -- some
22 understanding of what the context is so I can give an
23 intelligent answer.

24 Q. What's the size of a typical Cigarettes Cheaper
25 store?

26 A. About 1,000 square feet.

27 Q. And how many people work in a Cigarettes Cheaper
28 store at the same time?

30

1 A. From one to 25.

2 Q. Why would there be 25 people?

3 A. Sometimes we have meetings in stores.

4 Q. When it's not a meeting and it's just a store
5 open for business selling cigarettes, how many employees
6 are typically scheduled to work there at the same time?

7 A. One or two.

8 Q. And what is the desired location for a
9 Cigarettes Cheaper store?

10 A. It's where we can serve adults who smoke.

11 Q. Typically where are Cigarettes Cheaper stores
12 located?
13 A. Typically in shopping centers.
14 Q. By "shopping center" you mean like a strip mall?
15 A. I usually mean a grocery-anchored shopping
16 center. Wherever people do the bulk of their weekly
17 shopping.
18 Q. Okay. How does Cigarettes Cheaper decide where
19 to open a new location?
20 A. Cigarettes Cheaper will look at the location and
21 the rent, look at the -- the anchor and see how it's
22 doing. Look at the traffic on the street and the access,
23 look at the parking lot. Look at our experience in -- in
24 surrounding stores and the competition. And then guess.
25 Q. What does Cigarettes Cheaper do to advertise?
26 A. We don't really advertise.
27 Q. Is there any advertising that Cigarettes Cheaper
28 does?

31

1 A. Yes.
2 Q. What is it?
3 A. When we first open a store, we mail out a coupon
4 in the -- to the 20,000 closest residents.
5 Q. Coupon for what?
6 A. For \$10 off on a carton of cigarettes.
7 Q. Is there anything else that Cigarettes Cheaper
8 does to advertise?
9 A. Yes.
10 Q. What is it?
11 A. We do as good a job as we can for the customers
12 that we have, hoping that -- that those customers will
13 tell other people who might become our customers.
14 Q. Word of mouth? Is there anything else that
15 Cigarettes Cheaper does to advertise itself?
16 A. Yes.
17 Q. What is it?
18 A. We prepare a newsletter that we give to our
19 customers so that our customers can be informed.
20 Q. Is the newsletter mailed?
21 A. Yes.
22 Q. To whom?
23 A. My father mails it to some of his friends.
24 Q. Is it mailed to anyone else?
25 A. Not that I know of.
26 Q. So the main method of distribution of the
27 newsletter then is to hand it to customers in Cigarette
28 Cheaper stores?

32

1 A. That's correct.
2 Q. Is there anything else that Cigarettes Cheaper
3 does to advertise?
4 A. No. Well, when we get contacted by the media,
5 we tell them the truth and try and do as much as we can
6 for the media. I mean, I think that when we appear in
7 the newspaper or the television, that that counts a
8 little as advertising.
9 Q. Anything else?
10 A. That's all I recall at this time.
11 Q. Has Cigarettes Cheaper ever used any media for
12 advertising other than the mail-out coupons and the
13 newsletter?
14 A. Yes.
15 Q. Like what?

16 A. We've had some billboards.
17 Q. In California?
18 A. Oh, we have a billboard right now.
19 Q. In California?
20 A. Yes.
21 Q. Where is that?
22 A. It's at the intersection of 680 and 80 in
23 Cordelia, California.
24 Q. What does it say?
25 A. "Cigarettes Cheaper, call 1-800 Cheaper to find
26 the store nearest you."
27 (Interruption in the proceedings.
28 THE WITNESS: Pay no attention to that noise.

33

1 MR. HULBURT: Do you need to answer that? Let's
2 go off the record.
3 MR. KAMMER: We're off the record.
4 THE VIDEOGRAPHER: We're off the record. The
5 time is 9:58.
6 (Discussion off the record.)
7 THE VIDEOGRAPHER: We are back on the record.
8 The time is 9:59.
9 BY MR. HULBURT:
10 Q. Other than the one billboard at I680 and 80 -- I
11 don't know if it's I680. But the one billboard at 680,
12 are there any other billboards in California?
13 A. No.
14 Q. Have there been other billboards in California?
15 A. Not that I know of.
16 Q. Has there been any other advertising in
17 California, besides what we've already talked about?
18 A. Yes.
19 Q. What is it?
20 A. We did some display advertising in newspapers
21 when we open stores several years ago.
22 Q. What do you mean display advertising?
23 A. Advertising in newspapers is usually divided
24 into classified or display.
25 Q. When was the last time that you had any
26 newspaper advertising in California?
27 A. I think three years ago.
28 Q. Where was that?

34

1 A. We did it in the Benicia Harold.
2 Q. Any other papers?
3 A. Not that I recall.
4 Q. Is the Benicia Harold the only newspaper where
5 Cigarettes Cheaper has advertised?
6 A. No.
7 Q. It was the one that was three years ago?
8 A. Yes.
9 Q. All right. Has Cigarettes Cheaper -- does it
10 now have a company policy that it does not advertise?
11 MR. EATON: Misstates prior testimony.
12 THE WITNESS: Could you please repeat the
13 question.
14 BY MR. HULBURT:
15 Q. Yeah. Is it the policy of Cigarettes Cheaper
16 that it does not advertise in the media, other than the
17 one billboard and the mail-out coupons and the
18 newsletter?
19 A. We have no such specific policy.
20 Q. Before the Benicia Harold, what was the

21 frequency of advertising in the newspaper?
22 A. I don't think we'd advertised before that.
23 Q. So that's the only time?
24 A. Is that a question?
25 Q. Right. Is that the only time that Cigarettes
26 Cheaper's advertised in the newspaper was approximately
27 three years ago in the Benicia Harold?
28 A. I seem to recall trying to run that same ad

35

1 several times. I don't recall where -- what the
2 frequency is or where.

3 Q. Can you tell me other -- any other communities
4 or newspapers besides the Benicia Harold where Cigarettes
5 Cheaper ran a newspaper ad?

6 A. No, I don't recall any.

7 Q. What was the substance of that ad in the Benicia
8 Harold three years ago?

9 A. "This is how cigarettes should be sold."

10 Q. And then what did the ad say?

11 A. It said we had a new store in town and that we
12 believe that this is how cigarettes should be sold.
13 Customers should be treated with respect. That the
14 prices were cheaper. Minors weren't allowed to enter the
15 store. People owned themselves. Get to make decisions
16 for themselves. Things along that line.

17 Q. That -- that phrase "this is how cigarettes
18 should be sold" is a phrase that Cigarettes Cheaper
19 repeats frequently; is that right?

20 A. Yes.

21 Q. Is that sort of the one of the mottos or the
22 slogans of the company?

23 A. What do you mean by motto or slogan?

24 Q. Catch phrase that your company uses repeatedly
25 to identify itself to be a tag line for the company.

26 A. Well, we do tell people that this is how
27 cigarettes should be sold because we believe Cigarettes
28 Cheaper is how cigarettes should be sold. Does that

36

1 answer your question?

2 Q. So what is it about Cigarettes Cheaper that is
3 this is how cigarettes should be sold?

4 A. Cigarettes should be sold in -- in stores where
5 adults who smoke are served with respect. Where they pay
6 as little money as possible, and where minors aren't
7 allowed to enter the store.

8 Q. Is there anything else that you put into that
9 phrase of "this is how cigarettes should be sold"?

10 A. That's generally it.

11 Q. Does Cigarettes Cheaper have a Website?

12 A. Yes.

13 Q. What is the purpose of the Website?

14 A. Make us feel like we're part of the new century.

15 Q. When did the Website go up?

16 A. I believe last year sometime.

17 Q. Was it initiated as part of the Prop 28
18 campaign?

19 A. No. But to go back and add to my previous
20 testimony, it also is something that reporters and
21 attorneys can look at if they want to get information
22 about the company.

23 Q. Does Cigarettes Cheaper sell any products on its
24 Website?

25 A. No.

26 Q. Does it provide any information regarding the
27 availability or pricing of its products on the Website?
28 A. Yes. We tell people where we have stores.

37

1 Q. Does -- does the Website -- has the Website at
2 any time given any information regarding the specific
3 products?

4 A. Yes.

5 Q. Has it included prices?

6 A. No, not that I recall. Oh, that's incorrect.

7 It does include the prices on the "consider smoking" bag
8 that we wrote years and years ago.

9 Q. That's a book?

10 A. No. It was --

11 Q. Or a publication?

12 A. No. It was a bag.

13 Q. A bag. What does that mean, a bag?

14 A. When you go to a grocery store, usually they'll
15 put your groceries into a bag.

16 Q. All right. Has the Website at any time included
17 any prices for any of the tobacco products that are sold
18 at Cigarettes Cheaper?

19 A. I believe you've asked that and I've answered
20 it. Well, no, actually, the prices that are listed on
21 the "consider smoking" bag were for prices that were
22 being charged in the Cheaper discount grocery stores.
23 Not the prices that were being charged in the Cigarettes
24 Cheaper stores. So the bag predates the founding of
25 Cigarettes Cheaper.

26 Q. What's the name of the other company you
27 mentioned, the discount grocery store?

28 A. The Customer Company.

38

1 Q. And what is The Customer Company?

2 A. The Customer Company is a California
3 corporation.

4 Q. What does it do?

5 A. It owns a small store in Idaho.

6 Q. What's the name of that store?

7 A. Jerry's Market.

8 Q. Does The Customer Company do anything other than
9 own Jerry's Market?

10 A. Files tax returns.

11 Q. Is there any connection between The Customer
12 Company and Cigarettes Cheaper?

13 A. Yes.

14 Q. What is it?

15 A. The Customer Company was the predecessor of
16 Cigarettes Cheaper. Cigarettes Cheaper came out of The
17 Customer Company.

18 Q. Is there any difference between Premium Tobacco
19 Company and Cigarettes Cheaper other than name?

20 A. Cigarettes Cheaper was formerly known as Premium
21 Tobacco Stores.

22 Q. Was that simply a name change?

23 A. Yes.

24 Q. And everything else remained the same?

25 A. Yes.

26 Q. When was the name changed?

27 A. Sometime in the last couple years.

28 Q. And was there a chain of discount grocery stores

39

1 that The Customer Company operated?

2 A. Yes.
3 Q. And what was the -- what were the stores known
4 as?
5 A. Cheaper.
6 Q. Were any of those stores in California?
7 A. Yes.
8 Q. How many?
9 A. Probably 200 stores.
10 Q. Are those stores no longer owned by The Customer
11 Company?
12 A. That's correct.
13 Q. Are they -- are those stores in any way
14 connected to Cigarettes Cheaper?
15 A. No.
16 Q. Is Cigarettes Cheaper owned by the five
17 presidents?
18 A. Yes.
19 Q. Anyone else?
20 A. No.
21 Q. Is The Customer Company owned by the same five?
22 A. That's not true. I believe that -- that there
23 are several other owners represented by trusts.
24 Basically our children.
25 Q. Trusts related to the families of the five
26 presidents?
27 A. That's correct.
28 Q. Okay. And are the same people the owners of The

40

1 Customer Company?
2 A. Yes.
3 Q. Who's responsible for the content on the
4 Cigarettes Cheaper Website?
5 A. We all are.
6 Q. "We" meaning the five presidents?
7 A. Cigarettes Cheaper.
8 Q. Is there one person who has more involvement
9 with the Website than others?
10 A. Yes.
11 Q. Who's that?
12 A. Gen Chiro.
13 Q. Can you spell that.
14 A. G-e-n, C-h-i-r-o.
15 Q. What is Gen's position?
16 A. Gen sets copy and posts it on the Website. He's
17 a graphic artist.
18 Q. Who writes the content?
19 A. Primarily John Roscoe. I rewrite just about
20 everything he writes.
21 Q. Rewrite for what reason?
22 A. I write better than he does.
23 Q. Do you have to approve what's put on the
24 Website?
25 A. No.
26 Q. Does Cigarettes Cheaper keep track of how many
27 hits its Website receives?
28 A. No.

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1 Q. Do you have any information regarding the number
2 of hits that your Website receives?
3 A. Yes.
4 Q. Tell me about that. Tell me what you know about
5 the frequency or the number of hits on your Website.
6 A. My father-in-law found a Website that measured

7 hits at one point. And he told me how many hits we had
8 received. I don't recall the number at all.

9 Q. Does Cigarettes Cheaper have any information
10 regarding where the hits come from? Do you have any
11 information about the people who are coming to the
12 Website?

13 A. Yes.

14 Q. What?

15 A. Well, when people say they looked at our
16 Website, I generally know who they are and -- and what
17 they're talking about.

18 Q. Is there any method within your Website to
19 acquire information as to where the people are, what
20 state they're coming from or any information about the
21 people that are coming to the Website?

22 A. No.

23 Q. Is --

24 A. Well, I don't know. If someone sends us an
25 e-mail, I guess we know their e-mail address.

26 Q. Other than that?

27 A. No.

28 Q. Is the Cigarettes Cheaper Website linked to any
42 other Websites?

1 A. Yes.

2 Q. What?

3 A. It's linked to the Prop 28 Website.

4 Q. Is it linked to any other Websites?

5 A. Yes.

6 (Whereupon, the following testimony is deemed
7 confidential material and subject to protective order
8 entered by the Superior Court of the County of Los
9 Angeles, State of California and is bound separately.)
10 ////
11 ////
12 ////
13 ////
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19 ////
20 ////
21 ////
22 ////
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25 ////
26 ////
27 ////
28 ////

43

1 (Whereupon, this ends the testimony deemed
2 confidential and subject to protective order entered by
3 the Superior Court of the County of Los Angeles, State of
4 California.)

5 BY MR. HULBURT:

6 Q. Let's go off the record. I need to take a quick
7 break.

8 THE VIDEOGRAPHER: We are off the record. The
9 time is 10:16.

10 (Recess taken.)

11 (Whereupon, Mr. Bern left the proceedings and

12 Ms. Frostrom entered the proceedings.)
13 THE VIDEOGRAPHER: We are back on the record.
14 The time is 10:27.
15 (Exhibit 5016 was marked for identification.)
16 BY MR. HULBURT:
17 Q. Your attorneys produced a bunch of documents in
18 your case. And some of which I want to talk to you
19 about. First is a collection of documents identified as
20 PTS 1 through 4, which I'll mark as Exhibit 5016. Let me
21 first ask you if you're familiar with those. I'm going
22 to add to that PTS 37. So that will also be part of the
23 same exhibit.
24 A. Yes.
25 Q. Okay. Are these notices that are posted
26 somewhere in Cigarette Cheaper locations?
27 A. Yes.
28 Q. Are they all in use now, or can you give me some
45
1 dating of these things? Are they currently in use, or
2 they used to be in use, or some -- one's an earlier
3 version or here's the current one? Can you give me any
4 sort of historical perspective of what these notices are?
5 A. Would you please break that question down.
6 Q. Yeah. It's really one question of what's the
7 timing of these notices?
8 A. The notice mentioning gasoline is actually from
9 The Customer Company during the time that we had stores
10 that sold gasoline.
11 Q. That's PTS 2?
12 A. Yes.
13 Q. So that's not in use anywhere at this time; is
14 that correct?
15 A. I believe that's correct. When we sold the
16 stores, I don't know whether we left the -- those
17 particular decals up or not. Generally I think we tried
18 to remove them. The document that's marked PTS 37 and
19 PTS 3 appear to be the same document, except for the
20 telephone number is different. Both telephone numbers
21 still work. I don't know what the time is other than I
22 know the 888 cigar 80 was a telephone number that we used
23 a lot between -- sometime between 1995 and 1998.
24 Q. Is the -- is PTS 37 then something that is
25 currently in use?
26 A. I think PTS 37 is probably the current sign
27 that's -- that should be posted in all California stores.
28 Q. Where is it posted?
46
1 A. It's posted near the front door of the store.
2 Q. And is it true that Cigarettes Cheaper allows
3 smoking in its premises? The first line says "Warning,
4 these premises permit smoking." Is that -- is that a
5 true statement?
6 A. There are Cigarette Cheaper premises where
7 people smoke.
8 Q. Inside the store?
9 A. Yes.
10 Q. In what sort of location?
11 A. Where it is permitted by law.
12 Q. In California?
13 A. I don't recall that I have seen people smoke in
14 California. I know from being a grocer that cigarette
15 smoking is not permitted in a grocery store. California
16 has -- has strict regulations about smoking in public

17 places. Yet I think that there is an exception in the
18 law for stores that sell only tobacco products.

19 Q. This --

20 MR. EATON: Move to strike as nonresponsive.

21 BY MR. HULBURT:

22 Q. This PTS 37 is --

23 THE WITNESS: Thank you.

24 BY MR. HULBURT:

25 Q. PTS 37 is a sign that is in use in California
26 Cigarettes Cheaper stores?

27 A. Yes.

28 Q. And, in fact, it makes reference to California

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1 law and to sections out of the California code, correct?

2 A. Yes.

3 Q. And makes reference to "Warning, the following
4 products contain chemicals known to the State of
5 California to cause cancer." So maybe you've answered
6 this as best you can. But I want to know if there are
7 California Cigarettes Cheaper stores where smoking is
8 permitted.

9 A. I don't know.

10 Q. Is there a policy for the California stores that
11 smoking is not permitted?

12 A. I don't know.

13 Q. Who would know that?

14 A. The store managers, the district managers, the
15 section managers, region managers. Mark Baldwin might
16 know that. Jay Chapman might know that. And various
17 attorneys and so forth.

18 Q. Are there any separate rooms in any Cigarette
19 Cheaper stores in California that is like the smoking
20 room? Do you know what I mean by that?

21 A. Yes.

22 Q. There are some restaurants that I've been to
23 that have the cigar room somewhere in the place where you
24 can go in there and you can smoke if you want to. Is
25 there anything like that, a separate room in a Cigarettes
26 Cheaper store in California where people can go smoke?

27 A. No.

28 Q. Is there anything like that in any Cigarettes

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1 Cheaper stores anywhere in the country?

2 A. No.

3 Q. So let me go back to the original question with
4 this PTS 37. Is the first sentence a true statement,
5 these -- "Warning, these premises permit smoking"?

6 A. I don't know.

7 Q. Okay. I interrupted you then in the middle of
8 trying to explain to me the history of these various
9 warnings that are part of this exhibit. So if you would
10 continue that, please.

11 A. I don't know the timing of PTS 4. Although, I
12 notice that the Health and Safety Code is different than
13 it is on PTS 2. And I think I've testified to everything
14 that I know about these documents.

15 Q. Other than these documents which are part of
16 Exhibit 5016, are there any other warnings posted
17 anywhere in any Cigarettes Cheaper stores in California
18 regarding the health effects of cigarettes or cigarette
19 smoke?

20 A. Yes.

21 Q. Tell me about that.

22 A. Well, PTS 1 is posted in the humidor where we
23 sell handwrapped individual cigars.

24 Q. Okay.

25 A. I believe it's also posted in the domestic
26 tobacco area.

27 Q. Okay. So other than these pages which are all
28 part of this collection that we called Exhibit 5016, are

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1 there any other warnings that are posted in Cigarettes
2 Cheaper stores in California regarding the health effects
3 of cigarettes or cigarette smoke?

4 A. Yes.

5 Q. What are they?

6 A. The receipts, every receipt says "caveat
7 emptor."

8 Q. Meaning buyer beware?

9 A. Is that a question?

10 Q. Is that what it means?

11 A. Yes. That's the translation of caveat emptor.

12 Q. And what's your purpose in putting that on the
13 receipt?

14 A. It is our philosophy that -- that people own
15 themselves. That they make decisions for themselves.
16 That they need to be responsible for those decisions.
17 And that if you buy a product, you need to be aware of
18 the consequences of using that product.

19 Q. And so is there any place other than these
20 documents that we have as Exhibit 5016, anything that
21 Cigarettes Cheaper has posted that warns regarding the
22 health effects of cigarettes or cigarette smoke?

23 A. Yes.

24 Q. What?

25 A. Advertisements that mention cigarettes must also
26 include the Surgeon's General warning.

27 Q. Okay. Anything else?

28 A. That's all I recall at this time.

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1 Q. Has Cigarettes Cheaper provided any information,
2 besides these warnings that are part of Exhibit 5016,
3 besides caveat emptor and besides the Surgeon General's
4 warning, has Cigarettes Cheaper provided any information
5 to the public regarding the health effects of cigarettes
6 or cigarette smoke?

7 A. Yes.

8 Q. In what way?

9 A. During the Prop 28 campaign a variety of public
10 comments were made. During various media appearances
11 there have been questions about the health effects of
12 cigarettes. We've also mentioned that health effects of
13 smoking in the news from Cigarettes Cheaper.

14 THE REPORTER: I'm sorry. Say the last part
15 again.

16 THE WITNESS: We've also mentioned the health
17 effects of smoking in the news from Cigarettes Cheaper.

18 BY MR. HULBURT:

19 Q. That's the newsletter that's handed out?

20 A. Yes.

21 Q. Is there a file or some collection of the public
22 statements that have been attributed to Cigarettes
23 Cheaper related to the health effects of cigarettes and
24 cigarette smoke?

25 A. Yes.

26 Q. Where is that?

27 A. Well, it's on the Website. It's -- the news
28 from Cigarettes Cheaper are archived on the Website.

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1 Q. Is there any collection of press accounts or
2 interviews or quotes in the press that are attributed to
3 Cigarettes Cheaper or people on behalf of Cigarettes
4 Cheaper? Does Cigarettes Cheaper have that somewhere?

5 A. Yes.

6 Q. Where?

7 A. There is a reel of -- it's a videotape that has
8 news stories that have shown Cigarettes Cheaper.

9 Q. What do you call that?

10 A. The history reel.

11 Q. Tell me what's on the history reel.

12 A. If I get a videotape that has something about us
13 on it from the news, I send it to Second Site Video. And
14 they put it on the history reel.

15 Q. How many tapes now make up the history reel?

16 A. I think there's a couple hours.

17 Q. And where is the history reel maintained?

18 A. At Second Site Video.

19 Q. Where is Second Site Video?

20 A. It's in Lafayette, California.

21 Q. Do you have a copy of the video in your office
22 or in your offices?

23 A. Yes.

24 Q. And if we wanted to request it to be produced,
25 would we refer to it as the history reel?

26 A. Yes.

27 Q. All right. Is there anything besides the
28 history reel that would be a collection of comments in

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1 the media attributed to Cigarettes Cheaper?

2 A. Not that I recall.

3 Q. How about print media? Has anybody collected a
4 file of any comments in the print media?

5 A. Jason Garvin, our graphic artist, may have
6 collected that. Because I've given him clippings over
7 the years. To this date, though, I've never gotten the
8 -- the clippings back. I've asked him for it repeatedly.
9 And I think he throws them away.

10 Q. What's Jason Garvin's position?

11 A. He's a graphic artist.

12 Q. For -- for what purpose? For the Website?

13 A. Would you please --

14 Q. What does Jason Garvin do?

15 A. He does artwork for us. Signs, sign plans, so
16 forth.

17 Q. And is his -- where is his office located?

18 A. It's in the bunker in Benicia, California.

19 Q. And so if we were to request production of
20 whatever print media clippings you have attributed --
21 with statements attributable to Cigarettes Cheaper or
22 stores about Cigarettes Cheaper, how would we refer to
23 that?

24 A. We'd -- you'd probably say something like,
25 "Jason, what have you done with all those clippings that
26 Ned's given you over the years?"

27 Q. Is there -- other than Jason Garvin, is there
28 any other place where you think there is a collection of

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1 print media clippings --

2 A. No.

3 Q. -- with statements attributed to Cigarettes
4 Cheaper?
5 A. Maybe at the newspapers themselves.
6 Q. So all of the newsletters that are available for
7 the customers are also available on the Internet?
8 A. Yes.
9 Q. On the Website?
10 A. Yes.
11 Q. Going back how -- how many years?
12 A. I think the very first one's on there.
13 Q. When did you start the newsletter?
14 A. I think in 1998.
15 Q. And is the complete content of each newsletter
16 on the Website?
17 A. No.
18 Q. What -- what portions of the newsletters are on
19 the Website?
20 A. The copy that we write. I think the coupons are
21 missing. I think the mast head is missing.
22 Q. So the text of any articles or anything that --
23 well, you already said it. The copy that you write is --
24 is all in there?
25 A. Yes.
26 Q. Okay. Has Cigarettes Cheaper taken a public
27 position on the question of the health effects of
28 secondhand smoke?

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1 A. Yes.
2 Q. What is the position of Cigarettes Cheaper with
3 respect to the health effects of secondhand smoke?
4 A. The position is that it's still questionable.
5 Q. Questionable in what way?
6 A. We reprinted a story from The Guardian, a
7 British newspaper, that referred to a study by the World
8 Health Organization that came up with conclusions that
9 were different than the EPA's conclusions about the
10 health effects of secondhand smoke.
11 Q. So in what way is it questionable?
12 A. Well, if the World Health Organization comes up
13 with a conclusion that is different than the
14 Environmental Protection Agency, I think that -- that
15 there must be differences in method or differences in
16 conclusions.
17 Q. Did Cigarettes Cheaper -- well, strike that.
18 What -- you published excerpts from the article,
19 is that what you said?
20 A. Yes.
21 Q. Published them in the newsletter?
22 A. Yes.
23 Q. All right. Has Cigarettes Cheaper published any
24 parts of the EPA report?
25 A. No. To go back and correct my previous answer,
26 though, I think that we've also referred to a Harvard
27 study that found that the beneficial effects of exercise
28 outweigh the negative effects of smoking. That the

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1 middle-aged smoker who participates in strenuous regular
2 exercise will typically be in better health than a
3 sedentary nonsmoker of similar age and background.
4 MR. EATON: I'll move to strike the amendment as
5 nonresponsive, which was limited to secondhand smoke.
6 BY MR. HULBURT:
7 Q. Yeah. So what's the effect of that on the

8 person who is subjected to the secondhand smoke?
9 A. Well, secondhand smoke is weaker than primary
10 smoke. Exercise must be much more beneficial to someone
11 who -- who exercises strenuously than to someone who
12 breathes secondhand smoke.
13 Q. Has Cigarettes Cheaper published any information
14 from the EPA in its newsletter?
15 A. I don't recall that we have.
16 Q. Has Cigarettes Cheaper published any information
17 in the newsletter where the report or the source being
18 quoted concluded that secondhand smoke had negative
19 health effects?
20 A. No.
21 Q. So would I be correct in understanding that the
22 only thing that Cigarettes Cheaper has published to its
23 customers was a report which you understood to be
24 concluding that there was no connection between
25 secondhand smoke and adverse health effects?
26 A. No.
27 Q. What other than that has Cigarettes Cheaper
28 provided to its customers regarding secondhand smoke?

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1 A. I don't recall at this time.
2 Q. Can you recall anything that Cigarettes Cheaper
3 has published to its customers suggesting that there is a
4 negative health effect on -- of secondhand smoke?
5 A. Yes.
6 Q. What?
7 A. I seem to recall that we have published pieces
8 that have indicated that -- that smoking has negative
9 effects and -- by implication and that secondhand smoke
10 must also have negative effects.
11 Q. Is that what the article said or you -- by
12 implication you mean the reader would acquire that by
13 implication?
14 A. I think the reader would acquire that by
15 implication.
16 Q. Right. Not that Cigarettes Cheaper made that
17 conclusion?
18 A. We may have made that conclusion. On the other
19 hand, if we made that conclusion, I probably would have
20 cut it out.
21 Q. Why?
22 A. It's boring.
23 Q. Why is it not boring to publish something that
24 concluded there was no connection?
25 A. Well, the negative effects of secondhand smoke
26 are well-known. They're as well-known as gravity. You
27 know, if you drop something, it's going to fall. To tell
28 -- to write down in a newsletter that if you drop

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1 something, it's going to fall, that's boring. To -- to
2 say something that is commonly believed to be true might
3 not be true, that begins to be a little bit interesting.
4 Q. What do you understand to be the well-known
5 negative effects of secondhand smoke?
6 MR. EATON: Objection; calls for expert opinion.
7 THE WITNESS: You have a line here.
8 MR. KAMMER: You may answer the question.
9 THE WITNESS: Thanks. I think the well-known
10 idea is that if you breathe someone else's smoke, you're
11 going to get lung cancer, emphysema, various other
12 cancers, and you're going to die.

13 BY MR. HULBURT:

14 Q. Do you believe that's true?

15 MR. EATON: Same objection.

16 THE WITNESS: Your line.

17 MR. KAMMER: You may answer.

18 THE WITNESS: I don't know. I'm sure about the
19 dying part. As we say on the website, life is terminal.
20 That's not a flip comment. Everybody dies. Whether
21 secondhand smoke has such strong effects or not, I don't
22 know. I think in order of magnitude, though, it's
23 relatively far down the list of the things that are
24 important to health.

25 BY MR. HULBURT:

26 Q. Has Cigarettes Cheaper done anything to educate
27 its own customers regarding the adverse health effects of
28 secondhand smoke?

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1 A. Would you please repeat that question.

2 Q. Yeah. Has Cigarettes Cheaper done anything to
3 educate its own customers regarding the negative health
4 effects of secondhand smoke?

5 MR. EATON: Assumes facts not in evidence.

6 THE WITNESS: Yes.

7 BY MR. HULBURT:

8 Q. What?

9 A. I believe that some of the comments that we've
10 made about the negative effects of smoking have
11 reinforced ideas that our customers have had about the
12 negative effects of secondhand smoking. I believe that
13 those two ideas are completely linked in -- in readers
14 minds. If you say the one thing, I think it has an
15 effect on the other.

16 Q. So your thought is if you say that smoking is
17 bad, then people understand that secondhand smoke would
18 be bad also?

19 A. Yes.

20 Q. And, therefore, Cigarettes Cheaper sees no need
21 to say that secondhand smoke is bad?

22 A. I don't believe Cigarettes Cheaper has any such
23 position.

24 Q. Cigarettes Cheaper has frequently made public
25 comment that smoking is bad for your health?

26 A. Yes.

27 Q. You've been -- you've been quite candid and
28 direct about that?

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1 A. Yes.

2 Q. All right. And -- and so maybe you've already
3 answered this, but what is your reason that you have not
4 made public comment that secondhand smoke is bad?

5 MR. EATON: Asked and answered.

6 THE WITNESS: I don't know that there is a
7 reason or not a reason. We've said what we've said. And
8 the things we haven't said, we haven't said. And there's
9 an infinite number of reasons why somebody hasn't said
10 what they haven't said.

11 BY MR. HULBURT:

12 Q. All right. So why have you felt the need to
13 tell your customers that smoking is bad?

14 A. That's what our customers care about. It is --
15 it is an issue that -- that is very important to our
16 customers.

17 Q. They already know, don't they?

18 MR. EATON: Calls for speculation, lacks
19 foundation.
20 THE WITNESS: I expect that they do. I expect
21 that, if anything, customers overestimate the negative
22 effects of cigarette smoking.
23 BY MR. HULBURT:
24 Q. Yeah. Do you think there's any smoker out there
25 who doesn't know that smoking is bad for his or her
26 health?
27 MR. EATON: Same objections.
28 THE WITNESS: Yes.

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1 BY MR. HULBURT:
2 Q. Very few, though, huh?
3 MR. EATON: Same objections.
4 THE WITNESS: We hear from a lot of them.
5 BY MR. HULBURT:
6 Q. Do you think there is a significantly greater
7 number of smokers who are not aware that secondhand smoke
8 is equally dangerous?
9 MR. EATON: Same objections.
10 THE WITNESS: Could you please rephrase that
11 question.
12 BY MR. HULBURT:
13 Q. Yeah. Do you think there are a lot more smokers
14 who are not aware of the negative health effects of
15 secondhand smoke?
16 MR. EATON: Same objections.
17 BY MR. HULBURT:
18 Q. For the nonsmoker.
19 MR. EATON: I'm sorry. Same objections.
20 THE WITNESS: It's still a very complicated
21 question, I think. Let me take a stab at it. I think
22 that the negative effects of secondhand smoke are as
23 common as knowledge of gravity. Even among our customers
24 who smoke. Some of whom deny, based on their own
25 personal experience, that smoking has any negative
26 effects. I -- I would expect that if you ask those
27 people is smoking bad for other people, is secondhand
28 smoke bad for other people, they'd probably say "yeah."

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1 MR. EATON: Could I get the question back,
2 please.
3 THE WITNESS: Weren't you supposed to say move
4 to strike there?
5 MR. EATON: I may. But I need to hear the
6 question first.
7 (Record read.)
8 MR. EATON: Did I object to that?
9 THE REPORTER: Yes.
10 (Exhibit 5017 was marked for identification.)
11 BY MR. HULBURT:
12 Q. Let me show you what I'll mark as Exhibit 5017.
13 This is one of the newsletters that is published by
14 Cigarettes Cheaper and made available to its customers;
15 is that right?
16 A. Yes.
17 Q. Okay. And -- and I guess if we -- if we read
18 the mast head, this was the August 1997 newsletter; is
19 that correct?
20 A. Yes.
21 Q. It says circulation 522,000. How is that
22 determined?

23 A. That's how many copies we paid to have printed.
24 Q. Can you tell me how many copies actually go to
25 customers?
26 A. No.
27 Q. Can you give me your best estimate of how many
28 copies of the newsletter go to customers?

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1 A. 95 percent.
2 Q. On -- this is Document Number PTS 5 through 8.
3 And on page 3 of the exhibit, PTS 7, in the last
4 paragraph it says, "We are developing a software system
5 for our cash registers that will automatically check the
6 identification of each customer to ensure that we sell
7 only to adults. This software will accomplish the
8 objective of the following model cigarette ordinance."
9 And then there's a sample of an ordinance signed by John
10 Roscoe, the editor. Has that happened? Is there a
11 software system in place in Cigarettes Cheaper for
12 checking identification?

13 A. Yes.

14 Q. Tell me how that works.

15 A. There's a magnetic strip reader at the
16 checkstand in the state with a magnetic strip on the back
17 of a driver's license. The manager can swipe the
18 driver's license. And the PCU will look at the age and
19 give the appropriate response on the screen to the
20 manager.

21 Q. Is that used in California stores?

22 A. Yes.

23 Q. Is it used in all the California stores?

24 A. It is present in all the California stores. I
25 don't know whether it's used in all the California
26 stores.

27 Q. What is the policy of Cigarettes Cheaper with
28 respect to when to use the I.D. card swiping capability?

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1 A. No such specific policy exists.

2 Q. What are the managers told to do with -- in the
3 use or nonuse of this equipment?

4 A. Managers are shown how it works and what they
5 can do with it. But I think the actual rate of use is --
6 is rather low.

7 (Whereupon, the following testimony is deemed
8 confidential material and subject to protective order
9 entered by the Superior Court of the County of Los
10 Angeles, State of California and is bound separately.)

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1 (Whereupon, this ends the testimony deemed
2 confidential and subject to protective order entered by
3 the Superior Court of the County of Los Angeles, State of
4 California.)

5 (Exhibit 5018 was marked for identification.)

6 BY MR. HULBURT:

7 Q. Let me show you what I'll mark as Exhibit 5018,
8 which is a Cigarettes Cheaper newsletter dated August
9 1998, PTS 29 through 32. Is that what it is?

10 A. Yes.

11 Q. Okay. This makes reference on the third page --
12 which is PTS 31. It makes reference in the lower left,
13 it says, "We've printed information about secondhand
14 smoke in both the November 1997 and the April 1998 issues
15 of News from Cigarettes Cheaper. Our customers are aware
16 of the efforts of government to misstate the statistical
17 importance of secondhand smoke." Then goes on to say
18 "Imagine our surprise when this week we were sued by the
19 City of Los Angeles for failing to warn nonsmoking
20 individuals of the alleged dangers of secondhand smoke."

21 And it goes on to talk about your reaction to
22 the lawsuit. I'll just represent to you that in the
23 production from your company we did not receive from you
24 either the November 1997 or the April 1998 issues of the
25 newsletter. And so I want to ask you what Cigarettes
26 Cheaper said about secondhand smoke in those newsletters.

27 A. I don't recall, except that I believe one of
28 them refers to the article from the Guardian about the

1 studies conducted by the World Health Organization.

2 Q. Okay. Is there anything else that you can tell
3 me about the substance of either of those articles?

4 A. Perhaps one mentioned the dubious scientific
5 practices that were used to do the -- conduct the -- or
6 to make up the EPA Meta survey.

7 Q. From -- from what source of information would
8 you get that, that you then reported in your newsletter?

9 A. From the -- the public media, books, newspapers,
10 magazines, so forth. It was -- it was commonly discussed
11 at the time that an unusual procedure was used by the EPA
12 to come up with its conclusion.

13 Q. Do you know who wrote the -- the November and
14 April issues or who wrote the content regarding
15 secondhand smoke?

16 A. Yes.

17 Q. Who?

18 A. John Roscoe writes most of the newsletters. I
19 rewrite them.

20 Q. Okay. Can you tell me whether you rewrote -- on
21 the secondhand smoke whether you rewrote for grammatical
22 changes or substantive?

23 A. I can't tell you for that specific piece what
24 the original copy is and what finally came out.

25 Q. Typically when you rewrite his articles, are you
26 rewriting for substance, or are you rewriting for
27 grammar?

28 A. Typically for both. At the end it's hard to

1 tell who wrote one thing and who put in the other.

2 Q. Okay. Is there anybody besides you and -- and
3 John Roscoe who writes the articles in the newsletters?

4 A. Yes.
5 Q. Who?
6 A. The authors of the pieces that we quote.
7 Q. Anybody else at Cigarettes Cheaper who writes
8 the articles in the newsletter?
9 A. No, not that I recall at this time.
10 (Whereupon, Ms. Frostrom left the proceedings.)
11 THE WITNESS: These are some really good
12 articles you're showing me. You should read them
13 carefully.
14 (Exhibit 5019 was marked for identification.)
15 BY MR. HULBURT:
16 Q. Let me show you what I'll mark as Exhibit 5019,
17 which is a newsletter -- September 1998 newsletter, PTS
18 33 through 36. First just identify that it is what I
19 said it is.
20 A. Yes.
21 Q. Okay. And on page 3 of this newsletter there's
22 a little discussion regarding secondhand smoke. Would
23 this have been written by you and/or John Roscoe?
24 A. I'll read it. Yes. It's nice to see that's
25 also consistent with my previous testimony.
26 Q. Which -- which testimony?
27 A. That the -- the question about secondhand smoke
28 is still questionable.

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1 Q. Are you aware that there was a worldwide
2 strategy by Philip Morris to make sure that the question
3 of secondhand smoke would remain controversial?
4 MR. EATON: Assumes facts not in evidence,
5 argumentative.
6 THE WITNESS: I've read that recently.
7 BY MR. HULBURT:
8 Q. You read that article that -- that actually
9 included the copy of the memo from that meeting?
10 MR. EATON: Same objection.
11 THE WITNESS: I've read an article about it. I
12 don't recall the memo you refer to.
13 BY MR. HULBURT:
14 Q. Okay. Does that cause you any concern about
15 whether there is legitimate controversy regarding the
16 health effects of secondhand smoke?
17 MR. EATON: Same objection.
18 THE WITNESS: Okay. You got a bunch of
19 government bureaucrats. You got some tobacco companies.
20 And you're saying have these two unreliable groups
21 produced reliable science? I'll say I don't think it's
22 been worked out yet.
23 BY MR. HULBURT:
24 Q. And so you're -- you're comfortable saying it's
25 a controversy?
26 A. Absolutely.
27 Q. Have you read any of the studies other than
28 those that the tobacco company relies on to say that

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1 there's no provable health effects of secondhand smoke?
2 A. I've looked at some of the studies in the
3 Tobacco Control magazine.
4 Q. Is that something that you subscribe to?
5 A. Yes.
6 Q. Is that a journal that you read regularly?
7 A. No.
8 Q. Tell me about your reading habit of Tobacco

9 Control.
10 A. I look at the table of contents every so often
11 and look at articles that might be interesting. They all
12 seem to be pretty much the same, though.
13 Q. What kind of articles are in Tobacco Control?
14 A. They appear to be generally articles by people
15 who are paid to be against tobacco.
16 Q. Do you subscribe to any other journals related
17 to the industry of tobacco manufacture or sales?
18 A. Yes.
19 Q. What?
20 A. Cigarettes Cheaper has a subscription to various
21 convenience store publications, to Tobacco Outlook News,
22 to the Tobacco Reporter.
23 Q. Does Cigarettes Cheaper belong to any
24 associations?
25 A. Not that I can recall at this time.
26 Q. Is it -- is it a member of the Chamber of
27 Commerce in any of the communities in which it operates?
28 A. Not that I know of.

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1 Q. Does it belong to any retailer associations?
2 A. Not that I know of.
3 Q. Has it in the past?
4 A. Yes. No. No. The Cigarettes Cheaper has not.
5 Q. Okay. The other tobacco-related journals that
6 you referred to, do you regularly read those?
7 A. I look at -- at pretty much every issue.
8 (Whereupon, Mr. Bern entered the proceedings.)

9 THE WITNESS: I should have also included
10 Advertising Agent Supermarket News.

11 BY MR. HULBURT:

12 Q. What's your reason for subscribing to Tobacco
13 Control?

14 A. I thought that there might some day be something
15 interesting or important in -- in one of those journals.

16 Q. And so far you've not found that?

17 A. There are things that are interesting. Some of
18 the articles that you copied that I have looked at have
19 been interesting.

20 (Exhibit 5020 was marked for identification.)

21 BY MR. HULBURT:

22 Q. Let me show you what I'll mark as Exhibit 5020,
23 which is Number PTS 69 through 79. I don't actually know
24 if 7 is part of it. This is a brochure entitled "Tobacco
25 Issues & Answers, Some Facts About Smoking." Apparently
26 published by Brown & Williamson. Do you recognize this?

27 A. Yes.

28 MR. HULBURT: Okay. Let's go off the record a

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1 second.

2 THE VIDEOGRAPHER: We are off the record. This
3 concludes Tape 1 of the deposition. And the time is
4 11:25.

5 (Recess taken.)

6 THE VIDEOGRAPHER: We are back on the record.
7 This begins Tape 2 of the deposition of Ned Roscoe. And
8 the time is 11:37.

9 BY MR. HULBURT:

10 Q. Okay. We're talking about this Exhibit 5020,
11 Tobacco Issues & Answers. Let me just do this bit of
12 housekeeping. The last page, which is PTS 79, can you
13 tell me whether that actually is a page of the brochure

14 or whether that just happens to be a document that's
15 attached incorrectly?
16 A. I think it's the same as PTS 1.
17 Q. I think so, too.
18 A. I think it's attached incorrectly.
19 Q. All right. So I'm going to take it off. So the
20 exhibit will be 69 through 78. Can you tell me when you
21 received this brochure from Brown & Williamson?
22 A. You need to let the record show that that
23 warning appears in a lot of places, even un --
24 unobtrusively.
25 Q. Even incorrectly?
26 A. Yeah.
27 Q. It's pervasive.
28 A. I'm glad you were warned. Please repeat your

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1 question.

2 Q. When did you receive this brochure, Exhibit
3 5020?

4 A. Well, I see in the references that all the dates
5 are in the '86 period. So I would expect it was sometime
6 in the late '80s.

7 Q. And what did Cigarettes Cheaper do with this
8 brochure?

9 A. I think Cigarettes Cheaper pulled it out and
10 gave it to Gray, Cary to produce to you.

11 Q. Do you know why you received it, or is it
12 something you requested from Brown & Williamson and they
13 gave you information, or is it something they volunteered
14 to you or --

15 A. I'm sure that -- that it's something that Brown
16 & Williamson sent to the whole trade.

17 Q. Did Cigarettes Cheaper ever give this brochure
18 to any of its customers?

19 A. No.

20 Q. When did Cigarettes Cheaper first go into
21 business?

22 A. We opened our first store October 5th, 1994. We
23 were incorporated as a separate company I believe January
24 1st, 1995.

25 Q. Okay. So did this brochure come sometime after
26 Cigarettes Cheaper was opened?

27 A. No.

28 Q. You think you carried this over from -- from

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1 Cheaper?

2 A. Yes.

3 Q. Did you ever make this brochure available to any
4 of the customers of Cheaper?

5 A. No.

6 Q. What sort of file was this maintained in at
7 Cigarettes Cheaper?

8 A. In a manila folder.

9 Q. With what subject?

10 A. Smoking.

11 Q. So -- and is that a file in your office?

12 A. Yes.

13 Q. It's a file that you personally maintain?

14 A. No.

15 Q. What -- what is in the smoking file at
16 Cigarettes Cheaper?

17 A. Documents like that, things people have written
18 about smoking. I used to keep track of news clippings.

19 And then I went through a period where I threw them all
20 out.

21 Q. When documents were produced by Cigarettes
22 Cheaper to the lawyers at Gray, Cary, who was involved at
23 Cigarettes Cheaper in -- in accumulating the documents?

24 A. Mark Wagner and Sonja Stuart and me.

25 Q. Who is Mark Wagner?

26 A. He's a guy that just graduated from law school
27 who's been working as a paralegal.

28 Q. And who's Sonja Stuart?

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1 A. She's a 21-year-old that works as a file clerk
2 for me.

3 Q. Did you produce to the lawyers at Gray, Cary the
4 entire contents of the smoking file?

5 A. I believe that we did. I had Mark read the --
6 the request. And he sat in my office. And then I said
7 to the -- pointed him to the files and said, "Hey, we got
8 to produce everything that complies." Complies.
9 Applies. Is responsive. Some words like that.

10 Q. How -- how thick is the smoking file?

11 A. I don't know. Maybe an inch. Used to be
12 thicker before I threw the news clippings away.

13 (Exhibit 5021 was marked for identification.)

14 BY MR. HULBURT:

15 Q. Let me show you what I'll mark as Exhibit 5021,
16 which is PTS 87. It's entitled "Newsletter 130 dated May
17 3rd, 2000." U.S. Cigarette Price Increases -- "U.S.A.
18 Cigarette Price Increases.

19 This is a -- as I read it, this is a newsletter
20 to the employees of Cigarettes Cheaper; is that correct?

21 A. Yes.

22 Q. Okay. So this is different from the newsletter
23 that goes to the customers?

24 A. Yes.

25 Q. Is this a way that Mark Baldwin, the director of
26 operations, communicates with the stores?

27 A. Yes.

28 Q. Telling them sometimes what to do or what's

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1 coming up or all --

2 A. Yes.

3 Q. -- sorts of operations type information?

4 A. Yes.

5 Q. Okay.

6 (Interruption in proceedings.)

7 MR. HULBURT: Do you want to get that?

8 THE WITNESS: No. I kind of said that I was
9 going to answer this phone and not that phone. And it's
10 the that phone. It will stop in a second.

11 (Whereupon, the following testimony is deemed
12 confidential material and subject to protective order
13 entered by the Superior Court of the County of Los
14 Angeles, State of California and is bound separately.)

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1 (Whereupon, this ends the testimony deemed
2 confidential and subject to protective order entered by
3 the Superior Court of the County of Los Angeles, State of
4 California.)

5 MR. EATON: We're off the confidential. We're
6 no longer talking about the buy down.

7 THE WITNESS: R.J. Reynolds has not lived up to
8 its obligations under the Robinson-Patman Act. And that
9 we haven't been treated -- Cigarettes Cheaper hasn't been
10 treated in a fair and equitable manner.

11 BY MR. HULBURT:

12 Q. In what way?

13 A. Well, Wal-Mart has been on a Philip Morris Level
14 E contract and been allowed to participate in R.J.
15 Reynolds promotions. Philip Morris is not -- or
16 Cigarettes Cheaper is not.

17 Q. Are these display agreements and the buy downs,
18 from your perspective as the retailer, are they a way
19 that the tobacco companies control the price of the
20 cigarettes?

21 MR. BERN: Objection; calls for speculation.

22 THE WITNESS: Absolutely not.

23 BY MR. HULBURT:

24 Q. Why not?

25 A. Well, because I get competitive price
26 information from folks I know that are on contract. And
27 prices are all over the board. To my knowledge cigarette
28 companies don't have a really good handle on the fact

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1 that price is important to selling cigarettes.

2 Q. But they -- do they attempt to control the price
3 in a buy-down agreement?

4 MR. BERN: Objection; calls for speculation.

5 THE WITNESS: It hasn't been our experience that
6 that's happened.

7 BY MR. HULBURT:

8 Q. What's your understanding of the purpose of the
9 buy-down programs then?

10 MR. BERN: Calls for speculation.

11 THE WITNESS: The mantra that I have heard is
12 that pulsed price promotion drive market share. And I
13 believe that that's the general understanding at least at
14 Philip Morris.

15 BY MR. HULBURT:

16 Q. Pulse price promotion means pulsing the price up
17 and down?

18 A. Yes.

Q. Or pulsing it down in this case by a buy down?

20 A. Yes.

21 Q. So that for some period of time there'll be an
22 increase in sales?

23 A. Yes. With the idea that people will then switch
24 into the brand and that will make the brand stronger.

25 Q. Have you found that to be true in the experience
26 of Cigarettes Cheaper?

27 A. Well, there's no doubt that Marlboro market
28 share has continued to increase during the period of

1 pulsed price promotion. I don't think that that's why
 2 the -- the market share's increased, though. So did that
 3 answer your question?

4 Q. Why do you think it increases?

5 MR. BERN: Objection; the question is beyond the
 6 scope of the noticed topics.

7 MR. KAMMER: You can answer this one question.

8 THE WITNESS: Philip Morris has -- has an image
 9 that it conveys to customers the -- and product that they
 10 maintain the quality on. And the other manufacturers
 11 have no consistency, and I suspect have no -- very little
 12 concern about quality.

13 BY MR. HULBURT:

14 Q. Is Philip Morris the Number 1 manufacturer in
 15 the Cigarettes Cheaper stores?

16 A. Yes.

17 Q. What percent of the sales of Cigarettes Cheaper
 18 cigarettes are Philip Morris cigarettes?

19 A. About 68 percent.

20 Q. Has that been pretty steady over the past
 21 several years?

22 A. It -- it has grown.

23 Q. At least for significant number of years there
 24 was a great deal of promotion activity related solely to
 25 Philip Morris cigarettes rather than the other brands?

26 A. That's correct.

27 (Exhibit 5023 was marked for identification.)

28 ////

1 BY MR. HULBURT:

2 Q. Okay. Let me show you Exhibit 5023, which is
 3 PTS 89. It's "Newsletter 128" dated 4-23-2000. This is
 4 explaining the three free cartons per month program. Is
 5 there a program at Cigarettes Cheaper that the employees
 6 of Cigarettes Cheaper are entitled to have three free
 7 cartons of cigarettes each month?

8 A. No.

9 Q. What is the three free cartons per month program
 10 at Cigarettes Cheaper?

11 A. Eligible employees are currently able to ask us
 12 to send them three cartons a month, and we send it to
 13 them.

14 Q. How does one become an eligible employee?

15 A. You need to work 30 hours per week in the stores
 16 or store supervision.

17 Q. And the three free cartons is limited to certain
 18 brands?

19 A. Yes.

20 Q. And are they the brands that are in this memo?

21 A. Yes. I believe that Natural Harvest and Noble
 22 are also included. So is Peace and Revenge.

23 Q. All right. And actually the employee can choose
 24 to take any cartons or change -- or take it in loose
 25 tobacco?

26 A. That's correct.

27 Q. For -- for roll your own?

28 A. Yes.

1 Q. Okay. How long has Cigarettes Cheaper been
 2 engaged in that program?

3 A. I believe April of 2000 is when we began.

4 Q. And what's the purpose of that program?

5 A. It's for product knowledge. It's to get the --
6 the employees who choose to smoke experience in the
7 qualities of our own label.

8 Q. Does Cigarettes Cheaper encourage its employees
9 to smoke cigarettes?

10 A. No.

11 Q. Does Cigarettes Cheaper encourage them not to
12 smoke cigarettes?

13 A. Probably on balance we encourage them not to
14 smoke.

15 Q. Why?

16 A. My father tends to be in favor of people
17 quitting smoking.

18 Q. Why?

19 MR. EATON: Calls for speculation.

20 THE WITNESS: It's because when employees want
21 to do something and especially something that's difficult
22 for them, and you can give them some motivation to -- to
23 actually get it done, the employees are really proud of
24 themselves. And it strengthens the bond between the
25 employees and the company. And -- and he also thinks
26 it's better for them. He thinks that they're healthier.

27 BY MR. HULBURT:

28 Q. Is he a smoker?

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1 A. No.

2 Q. Is he an ex-smoker?

3 A. No.

4 Q. Never been a smoker?

5 A. Never.

6 Q. What about you?

7 A. I smoke at the request of a customer.

8 Q. What does that mean?

9 A. That means if a customer asks me to have a
10 cigarette, I will.

11 Q. How about the rest of the five presidents, are
12 they smokers?

13 MR. EATON: Beyond the scope.

14 MR. KAMMER: Objection; it's beyond the scope,
15 and I'll instruct the witness not to answer. And Mr.
16 Foster -- actually, it's noon.

17 MR. EATON: This is a good time to take a break.

18 It is noon.

19 MR. KAMMER: Ned will settle for pizza.

20 MR. HULBURT: Let's go off the record.

21 THE VIDEOGRAPHER: We are off the record. The
22 time is 12 noon.

23 (Whereupon, the lunch recess was taken at 12:00
24 p.m.)

25 * * * *

26

27

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1 SAN DIEGO, CALIFORNIA; FRIDAY, JULY 7, 2000, 12:45 P.M.

2 (Mr. Eaton and Mr. Bern are not present.)

3 (Mr. Kammer left the proceedings and Mr. Foster
4 entered the proceedings.)

5 THE VIDEOGRAPHER: We are back on the record.

6 The time is 12:46.

7

8 FURTHER EXAMINATION BY MR. HULBURT:

9 Q. Can you tell me your educational background.

10 A. Yes.
11 Q. What is it?
12 A. I graduated from Del Valle High School in Walnut
13 Creek. And attended and graduated from the University of
14 Chicago.
15 Q. With what degree?
16 A. An AB in economics.
17 Q. Have you had any other further former education
18 since then?
19 A. No.
20 Q. Why did your family go from operating grocery
21 stores to operating exclusively tobacco sale stores?
22 A. I don't -- I think that that question assumes
23 facts not in evidence.
24 Q. Mr. Eaton is gone, and as you said, you're
25 taking over for him?
26 A. Yeah.
27 Q. Well, I'm -- I'm trying to understand the
28 thought process in transitioning from operating several

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1 hundred discount grocery stores to instead selling those
2 off and operating several hundred cigarette stores.

3 A. Okay. Would you please ask the question.
4 Q. Yeah. From the retailers' perspective, what was
5 the thought process that led to that transition in your
6 family's business?

7 A. We always sold a lot of cigarettes in the
8 grocery stores. And we came upon the idea that we could
9 just do cigarettes, and we tried it. And it was a lot
10 easier and a lot simpler. And we were philosophically
11 suited for it. That it -- and it required a much smaller
12 investment per store. That just appeared to be a much
13 better business than what we were doing before. Plus
14 everybody wants to sell groceries. Not everybody wants
15 to sell cigarettes.

16 Q. What do you mean when you say "we were
17 philosophically suited for it"?

18 A. Well, we believed that people own themselves.
19 That they make decisions for themselves and that they're
20 responsible for -- for what they do.

21 (Whereupon, Mr. Bern entered the proceedings.)

22 THE WITNESS: Most other -- many other people
23 believe that customers are stupid, that customers don't
24 appreciate what they're doing, that they are manipulated
25 in some way into doing it. For -- it's our belief that
26 individuals ought to be as free as possible to make
27 decisions on their own. And that in the making the
28 decision about smoking is one of the ways that people

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1 demonstrate now that they are free to choose.

2 BY MR. HULBURT:

3 Q. And -- and so why does that make you
4 philosophically different from a grocery store that sells
5 cigarettes and other products? I'm not -- I understand
6 the philosophy, but I don't understand the thought about
7 being philosophically suited for cigarette business.

8 MR. FOSTER: I'm going to have to object.
9 We're, to my appreciation, very far afield form anything
10 that's been noticed for discussion in this deposition. I
11 don't see that the discussion relates to any category
12 that -- that we've been through before. I gave you a
13 little bit of latitude to -- to start down this path.
14 But I'm not sure where it's going. And I don't see the

15 relationship to a noticed subject.

16 MR. BERN: And I object on the grounds it calls
17 for speculation.

18 THE WITNESS: I can speculate if you'd like.

19 BY MR. HULBURT:

20 Q. I'm just trying to understand your answer. When
21 you said you're philosophically suited for the business,
22 you explained to me your philosophy and -- or part of
23 your philosophy. And now I want to understand why that
24 makes you philosophically suited for the business of
25 selling cigarettes. I'm still just trying to understand
26 your answer.

27 MR. BERN: I'll just state for the record that
28 was not the last question that was asked and objected to.

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1 And I don't believe there's a question pending now.

2 MR. FOSTER: I think the question you just
3 framed has -- has been asked and answered.

4 THE WITNESS: Shall I answer?

5 MR. FOSTER: Go ahead one more time. Let's see
6 if we can bring this subject to a close.

7 THE WITNESS: It is a key part of our
8 competitive advantage in serving our customers that we
9 believe we should treat customers in the way we would
10 like to be treated. And it's our experience, in noticing
11 how our competitors treat customers, that they don't seem
12 to feel that way, that they don't treat our customers
13 with respect.

14 BY MR. HULBURT:

15 Q. In what way? What do you mean by that?

16 A. They lock up the product. They give the
17 customer lectures about how they shouldn't use the
18 product. Sometimes they give them lectures on their --
19 on their promotional material. Like Longs has in their
20 ads saying you should stop smoking or something. We
21 don't do that.

22 MR. HULBURT: Let's go off the record a second.

23 THE VIDEOGRAPHER: We are off the record. The
24 time is 12:52.

25 (Discussion off the record.)

26 THE VIDEOGRAPHER: We are back on the record.

27 The time is 12:55.

28 ////

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1 BY MR. HULBURT:

2 Q. What is the -- or what was the "win what you
3 buy" drawing program at Cigarettes Cheaper?

4 A. Customers would take their receipts and put them
5 into an aquarium once a week. We would pull out a
6 receipt and call that customer up. And they would win
7 what they had bought on the receipt.

8 Q. The same thing?

9 A. Yes.

10 Q. And they somehow identified their receipt as
11 theirs?

12 A. They would write their name and so forth on the
13 back. Going back to my earlier testimony, that was
14 another way we obtained names for the database.

15 Q. All right. That was obviously going to be my
16 next question. So is there any other way that we haven't
17 yet talked about that you obtained names and identifying
18 information for the database?

19 A. Not that I recall.

20 Q. Is this "win what you buy" drawing program still
21 ongoing?
22 A. It's not ongoing now. We're going to start it
23 again on July 29th in the new stores that we open.
24 Q. During what period of time were you operating
25 this drawing program?
26 A. I think we stopped at some time last year.
27 Q. And when did it begin?
28 A. Two or three years before that.

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1 Q. Is that a program that you've done in
2 California?
3 A. Yes.
4 Q. It's -- it's company wide throughout all the
5 stores?
6 A. It was.
7 (Exhibit 5024 was marked for identification.)

8 BY MR. HULBURT:

9 Q. It was. Let me just show you what I'll mark as
10 Exhibit 5024, which is one of the newsletters from Mark
11 Baldwin dated 4-3-2000. It's entitled "Welcome to the
12 New Store Look." And it's talking about the resets in
13 the stores. Resets means what?

14 A. We changed the schematic, which is the plan for
15 where cartons go in stores, what goes on what rack.

16 Q. And is that related to the change in the
17 agreement with Philip Morris and the new agreements with
18 the other companies?

19 A. Yes.

20 Q. So is this really part of the earlier discussion
21 that you and I already had that you -- you changed the
22 agreement with Philip Morris, you got a new agreement
23 with R.J. Reynolds, and you're working on agreements with
24 the others?

25 A. Yes.

26 Q. Okay. This memo in the first or the second
27 paragraph says "Your Philip Morris reps may be less than
28 hospitable. Make sure you take the high road and are

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1 very polite and reasonable." Were there any problems
2 with Philip Morris reps as a result of the changes in the
3 stores?

4 A. Yes.

5 Q. Like what? Give me some examples?

6 A. In the Redding area a Philip Morris rep came in.
7 He was very angry, and he removed the Marlboro clock and
8 Marlboro neon, and pouted and was generally unpleasant.

9 Q. Was there any other instances like that?

10 A. The same guy in Redding had the same problem in
11 a number of stores. Other than that I don't recall any.

12 (Exhibit 5025 was marked for identification.)

13 BY MR. HULBURT:

14 Q. Okay. This memo which I'll mark as Exhibit 5025
15 dated April 8th, 2000 is from John Roscoe. It's Document
16 PTS 202 and 203. Newsletter Number 104. This seems to
17 me to be along the same lines of this transition in the
18 Philip Morris agreement and the new R.J. Reynolds
19 agreement. Is that -- is that correct?

20 A. Yes.

21 Q. All right. This is sort of explaining what
22 you've talked about some here that historically here's
23 what we were doing with Philip Morris, here's where it
24 got us, here's what we're going to do about it now?

1 reduction from 2 to \$10?
2 MR. BERN: Objection; assumes facts not in the
3 record.
4 THE WITNESS: I believe we wanted to have the --
5 the so-called list price to be the same as the major
6 brand price because the quality of the cigarettes is as
7 good as what the American manufacturers put in major
8 brands, and that we thought, well, we should start at
9 that price point.
10 BY MR. HULBURT:
11 Q. So the sales strategy was to price the internal
12 brands at the same price as the American equivalent
13 brands?
14 A. The list price is priced as the same as
15 equivalent in American brands.
16 Q. List price meaning what?
17 A. List price, the original price that people would
18 take the discount off of.
19 Q. So from the list price they would take \$10 off?
20 A. Yes.
21 Q. Okay. What was the reasoning of going from \$2
22 off to \$10 off?
23 A. To increase the list price to be the same as the
24 American major brand retail.
25 Q. So -- I see. So the customer in the end is
26 paying the same price --
27 A. Yes.
28 Q. -- for the cigarettes?

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1 A. Yes.
2 Q. Whether they got \$2 off or \$10 off, they're
3 actually paying the same price because the price was
4 changed?
5 A. Yes.
6 Q. Okay. Whose idea was it to do this release
7 agreement or the smokers acceptance of responsibility?
8 A. I believe it was John Roscoe's.
9 Q. What is the -- what is the thought process
10 behind this release agreement program at Cigarettes
11 Cheaper? What's the purpose?
12 A. Consistent with our philosophy that people own
13 themselves and make decisions for themselves, for these
14 brands which we have the responsibility, we -- we wanted
15 customers to acknowledge going into it that they were
16 going to release us from -- from liability, that they
17 were going to accept the consequences of their own
18 actions.
19 Q. What brands apply to the release agreement
20 program?
21 A. I believe that includes Geronimo, Bandito,
22 Revenge, Natural Harvest, Noble and Peace and Money
23 Menthol.
24 Q. Some of those are brands for which you have an
25 indemnity agreement with Altadis?
26 A. Yes.
27 Q. And so why on those cigarettes are you having
28 customers sign release agreements?

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1 A. Because the -- the philosophical decision by the
2 customer to accept responsibility is something that we
3 value.
4 Q. So I'm going to ask you again. Why don't you
5 have them sign it for all the cigarettes they purchase?

11 I would caution the witness not to divulge any
12 discussions with counsel with regard to that subject.
13

14 THE WITNESS: Would you please restate the
15 question.

16 BY MR. HULBURT:

17 Q. Yeah. I want to know if it really is your
18 expectation that this release agreement will work, that
19 if a customer who signs this sues Cigarettes Cheaper,
20 that this release agreement will protect you from
liability.

21 MR. FOSTER: Same objections. You can respond.

22 THE WITNESS: Boy, in a hypothetical situation
23 like that, you've clarified the question, I don't know.

24 BY MR. HULBURT:

25 Q. Is that the -- is that your purpose so that you
26 actually have a release agreement which actually protects
27 Cigarettes Cheaper from liability?

28 A. I believe that your question refers to my

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1 earlier answer. Would you please restate your question.

2 Q. Yeah. The question is: Is it the purpose of
3 this release agreement to protect Cigarettes Cheaper from
4 liability?

5 A. Yes.

6 Q. Is there any other purpose?

7 A. Yes.

8 Q. What are the other purposes?

9 A. It is to communicate our philosophy.

10 Q. All right. That's what I thought. That's why
11 I'm asking the question.

12 A. And to get agreement from our customers to what
13 we believe and what we think is absolutely true.

14 Q. Okay. So I expected that, that this is really
15 part of Cigarettes Cheaper putting its philosophy out
16 there. And what I'm really wanting to know is, and in
17 addition to that, do you really believe that this is
18 protecting you from liability?

19 A. Yes.

20 Q. Has Cigarettes Cheaper had this release
21 agreement evaluated by an attorney in order to get an
22 opinion as to whether this will actually protect
23 Cigarettes Cheaper from liability?

24 MR. BERN: I object to this question as beyond
25 the scope of the deposition notice today.

26 MR. FOSTER: Join in the objection.

27 THE WITNESS: I think it's also protected by the
28 attorney-client privilege.

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1 BY MR. HULBURT:

2 Q. Well, the question right now is a "yes" or "no."

3 MR. FOSTER: He can ask you that. You can
4 answer "yes" or "no."

5 BY MR. HULBURT:

6 Q. Because I haven't asked you what anybody said.

7 A. Would you please repeat the question.

8 Q. Yeah. Can we have it read back.

9 (Record read.)

10 THE WITNESS: Yes.

11 BY MR. HULBURT:

12 Q. When was that done?

13 A. 1999.

14 Q. And was the release agreement rewritten as a
15 result of that?

16 A. Yes.
17 Q. So that whatever is currently in use is the
18 result of some legal opinion?
19 MR. FOSTER: I think you're coming too close to
20 invading the privilege, Counsel. I'm going to instruct
21 the witness not to answer.
22 THE WITNESS: I think it's a little like you and
23 the pediatrician. You know, the specialist.
24 (Exhibit 5028 was marked for identification.)
25 BY MR. HULBURT:
26 Q. Exhibit 5028 is an August 13th, 1999 newsletter
27 from John Roscoe. It's Document PTS 177. Strike that.
28 I'm not going to use that document as an exhibit.

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1 Exhibit 5028 is PTS 178. It's an August 20th,
2 1999 memo or Newsletter Number 81. Are you familiar with
3 that document?

4 A. Yes.
5 Q. Let me take a step backwards first. There's
6 some memos here in this timeframe, the fall of 1999, that
7 are coming from John Roscoe as opposed to Mike Baldwin.
8 Is that because at some period of time John Roscoe was
9 the one who sent information on memos to the stores, or
10 were they doing it both at the same time, or each sends
11 different kinds of memos? Or why are these memos coming
12 from John Roscoe as opposed to Baldwin?

13 A. John wanted to communicate with the stores. He
14 had the message to communicate. So he communicated.

15 Q. Was there a period of time where the store
16 newsletters were coming from John Roscoe as opposed to
17 Mike Baldwin?

18 A. No.

19 Q. So they're --

20 A. It's Mark, not Mike.

21 Q. I'm sorry. So they're both sending newsletters
22 as necessary at the same time?

23 A. Yes.

24 Q. Okay.

25 A. Sometimes all five of us will send something.

26 Q. Okay. This particular memo then, Exhibit 5028,
27 explains once a customer signs the release agreement,
28 this is how we're going to respond to them, this is how

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1 we reply?

2 A. Yes.

3 Q. Is this what actually happens?

4 A. Yes.

5 Q. This memo accurately describes what actually
6 happens at Cigarettes Cheaper?

7 A. No.

8 Q. Okay. What happens when a customer signs the
9 release agreement for the first time?

10 A. The information is sent to the office, and a
11 letter and a card is sent back to the customer.

12 Q. And the information's put in the database?

13 A. Yes.

14 Q. And the letter -- does the letter read the way
15 this memo suggests it would read?

16 A. No.

17 Q. What does the letter say?

18 A. I don't recall.

19 Q. What is the card? Is it like the size of a
20 credit card?

21 A. Yes.
22 Q. And what's on the card?
23 A. On one side there's blue ink. And printed in --
24 in reverse white it has to the right a square that says
25 "general release" in probably 36-point type. To the left
26 there is the copy that said "I decided" -- something to
27 the effect that "I release the company." And then there
28 are three or four bullet points. And generally to the

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1 effect that they acknowledge the risk and release the
2 company for a reduced price.

3 Q. And it's an identification card as well? Does
4 it have their name on it?

5 A. Yes, it does.

6 Q. Does it have some sort of identifying number?

7 A. Yes.

8 Q. Is it a magnetic strip card?

9 A. No.

10 Q. Is there anything else on the card?

11 A. I believe there's a bar code.

12 Q. What information comes from the bar code?

13 A. The number of the release.

14 Q. Which corresponds to that person's number in the
15 database?

16 A. Yes.

17 Q. Is -- is the bar codes used in any way by the
18 stores?

19 A. No.

20 Q. Are there bar code readers?

21 A. Yes.

22 Q. And is there any time when the store would use
23 the bar code reader on a person's card?

24 A. No.

25 (Whereupon, the following testimony is deemed
26 confidential material and subject to protective order
27 entered by the Superior Court of the County of Los
28 Angeles, State of California and is bound separately.)

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1 (Whereupon, this ends the testimony deemed
2 confidential and subject to protective order entered by
3 the Superior Court of the County of Los Angeles, State of
4 California.)

5 (Exhibit 5029 was marked for identification.)

6 BY MR. HULBURT:

7 Q. Exhibit 5029 is an October 22nd, '99 newsletter
8 from John Roscoe. It's Document PTS 182. It says the
9 "News from Cigarettes Cheaper October/November has been
10 shipped to each store. Since this is such an important
11 issue, we've printed 750,000 copies." Can you tell me
12 why that issue was such an important issue.

13 A. No.

14 Q. Do you know what was in that issue?

15 A. No. Yes. Yes, I do.

16 Q. What?

17 A. It was the report on our trip to the -- see the
18 tobacco harvest in North Carolina.

19 Q. And why was that such an important issue that
20 extra copies were printed?

21 A. It was a good -- it was a good store. We went
22 out in search to find out where the evil was put into
23 cigarettes.

24 Q. What do you mean by that?

25 A. Well, it's generally considered that cigarettes

26 are evil. And so we went from the ground to the point of
27 production to try and find out where -- when the evil got
28 put into it.

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1 Q. So the title was "In search of evil"?

2 A. Yes.

3 Q. And did you find it?

4 A. No. We excluded some possibilities, though.

5 Q. What did you do to search for the evil?

6 A. We went to a tobacco farm.

7 MR. FOSTER: Objection; we're a little bit far
8 afield here. Why don't we get back to some of the topics
9 that are listed in the deposition notice.

10 BY MR. HULBURT:

11 Q. Did you do anything other than go to the tobacco
12 farm?

13 A. Yes.

14 Q. What else?

15 A. We went to an auction house. We went to a leaf
16 processor. We went to a manufacturing plant.

17 Q. Philip Morris?

18 A. No.

19 Q. Where was that?

20 A. Bailey. Gidsville, Virginia.

21 Q. Did you do anything else?

22 A. Yes.

23 Q. What?

24 A. We went to a pig picking.

25 Q. And didn't find anything?

26 THE REPORTER: I'm sorry? A what picking?

27 THE WITNESS: Pig picking.

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1 BY MR. HULBURT:

2 Q. Did you do anything else?

3 A. Yes.

4 Q. What?

5 A. Went to a steak house.

6 Q. Okay. Anything else?

7 A. Had breakfast.

8 Q. Anything else in search of the evil?

9 MR. BERN: Objection; vague and ambiguous.

10 THE WITNESS: We talked to people in the tobacco
11 business.

12 BY MR. HULBURT:

13 Q. Who?

14 A. Talked to an auctioneer, talked to farmers,
15 talked to a leaf buyer, talked to a blender.

16 (Exhibit 5030 was marked for identification.)

17 BY MR. HULBURT:

18 Q. Exhibit 5030 is a January 31st, 2000 memo from
19 John Roscoe regarding the mission statement. Does that
20 memo accurately recite the mission statement of
21 Cigarettes Cheaper?

22 A. No.

23 Q. What is that?

24 A. That is the January 31st, 2000 Cigarettes
25 Cheaper newsletter Number 95 that says our mission
26 statement.

27 Q. Is there a mission statement?

28 A. Yes.

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1 Q. What is it?

2 A. Cigarettes Cheaper, the best specialty retailer
3 of cigarettes changes the way cigarettes are sold. We
4 expect to sell more than 20 percent of all cigarettes
5 sold in the United States. We will change not only where
6 people buy cigarettes, but also the types and brands they
7 smoke. Cigarettes will be sold through good looking,
8 efficient stores, staffed by pleasant, happy,
9 well-compensated people. We will respect smokers and
10 support their reasonable need for accommodation by
11 nonsmokers.

12 We will sell cigarettes to adult customers who
13 have voluntarily chosen to smoke. We will continue to
14 emphasize that the smokers must accept the responsibility
15 for any consequences of their choice. We will sell
16 quality cigarettes at lower prices than other stores. We
17 will be responsible members of society. Cigarettes
18 Cheaper will become a major company while operating in
19 the balanced best interests of those involved.

20 Q. And you read that off of Exhibit 5030?

21 A. Yes, parts of it.

22 Q. Is there any part of the mission statement that
23 you just recited that is not included in the four bold
24 paragraphs on Exhibit 5030?

25 A. Yes.

26 Q. What?

27 A. In the first line instead of saying "the Number
28 1," we now say "the best."

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1 Q. "Cigarettes Cheaper, the best specialty retailer
2 of cigarettes"?

3 A. Yes.

4 Q. Okay. That's the only difference?

5 A. Yes.

6 Q. When did the mission statement -- when was it
7 developed?

8 A. January of 2000. It was done this century.

9 (Whereupon, the following testimony is deemed
10 confidential material and subject to protective order
11 entered by the Superior Court of the County of Los
12 Angeles, State of California and is bound separately.)

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1 (Whereupon, this ends the testimony deemed
2 confidential and subject to protective order entered by
3 the Superior Court of the County of Los Angeles, State of
4 California.)

5 BY MR. HULBURT:

6 Q. Does Cigarettes Cheaper sell any cigarettes for

7 resale?
8 A. No. Not intentionally.
9 Q. There's no price reduction for resale?
10 A. No.
11 Q. Does Cigarettes Cheaper sell cigarettes to
12 anyone other than a customer who walks into the store?
13 By that I mean that you have some other business
14 relationships, other distribution, other companies or
15 stores that you might sell to.
16 A. Yes.
17 Q. Tell me about that.
18 A. We sell to two of our former stores.
19 Q. What are they?
20 A. I don't know the names.
21 Q. Two of the former grocery stores?
22 A. Yes.
23 Q. By two, you mean just two locations?
24 A. Yes.
25 Q. Where are they?
26 A. Pacheco and Panoche.
27 Q. In California?
28 A. Yes.

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1 Q. And are those sold through a Cigarettes Cheaper
2 store?

3 A. No.

4 Q. How are they sold?

5 A. The stores order on occasion, and we deliver to
6 the stores and they pay us.

7 Q. What brands are sold to those two former stores?

8 A. Whatever we purchase from McClane.

9 Q. Does Cigarettes Cheaper sell cigarette company
10 gear?

11 A. Yes.

12 Q. Like what? Give me examples.

13 A. Jackets, shirts, so forth.

14 Q. Hats?

15 A. Yes.

16 Q. With cigarette company brands and logos on them?

17 A. Yes.

18 Q. And are they sold in the stores so somebody
19 could walk into the store and buy it?

20 A. Actually, to restate, the correct answer to the
21 prior question was no.

22 Q. Which question?

23 A. With cigarette company's logos on them.

24 Q. What kind of cigarette company gear -- or what
25 -- what about it makes it cigarette company gear if it
26 doesn't have the brand or logo on them?

27 A. You asked the question in the plural.

28 Q. So what's on the cigarette company gear that is

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1 sold by Cigarettes Cheaper?

2 A. Usually Marlboro, Benson & Hedges or Virginia
3 Slim.

4 Q. The brand name?

5 A. Yes.

6 Q. Anything else?

7 A. Whatever the attributes are of the -- of the
8 individual item.

9 Q. Has there been a change in the sale of gear in
10 Cigarettes Cheaper stores as a result of the Master
11 Settlement Agreement?

12 A. Yes.
13 Q. In what way?
14 A. It's just on a close-out mode now.
15 Q. Meaning whatever stock you have now, you'll sell
16 and you're not getting any more?
17 A. That's correct.
18 Q. What's your understanding of the reason for
19 that?
20 A. Because of the Master Settlement Agreement, gear
21 is no longer being produced.
22 Q. Have you read the Master Settlement Agreement?
23 A. No.
24 Q. Have you read any parts of it?
25 A. Yes.
26 Q. What parts have you read?
27 A. I don't recall.
28 Q. Have you read parts related to gear?

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1 A. No, not that I recall.
2 Q. Have you read parts related to point of -- point
3 of sale advertising?
4 A. I believe that I have.
5 Q. Has -- has the sale of cigarettes at Cigarettes
6 Cheaper changed in any way as a result of the Master
7 Settlement Agreement?
8 A. Yes.
9 Q. In what way?
10 A. We charge more money.
11 Q. Any other changes?
12 A. Yes.
13 Q. What?
14 A. We sell more.
15 Q. Any other changes?
16 A. We sell more private label.
17 Q. Any other changes?
18 A. Customers gripe more.
19 MR. BERN: I'm sorry. I didn't hear that.
20 MR. FOSTER: Customers gripe more.
21 BY MR. HULBURT:
22 Q. When you say you sell more, is that just private
23 label, or is that all brands?
24 A. That's all brands.
25 Q. Why?
26 MR. FOSTER: Objection; calls for speculation,
27 lacks foundation.
28 THE WITNESS: Would you like me to speculate?

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1 BY MR. HULBURT:
2 Q. I'd like your opinion as a retailer why you
3 think your sales have increased since the Master
4 Settlement Agreement.
5 A. When the price of a commodity becomes -- gets
6 higher, people decide they need to shop around. And they
7 come to Cigarettes Cheaper because we're cheaper. This
8 is the important phone call.
9 (Interruption in proceedings.)
10 MR. HULBURT: Let's go off the record.
11 THE VIDEOGRAPHER: We are off the record. The
12 time is 1:32.
13 (Discussion off the record.)
14 THE VIDEOGRAPHER: We're back on the record.
15 The time is 12:33.
16 BY MR. HULBURT:

17 Q. Other than what you've already told me, have
18 there been any other changes in the sale of cigarettes at
19 Cigarettes Cheaper as a result of the Master Settlement
20 Agreement?

21 A. Yes.

22 Q. What?

23 A. The amount of buy down has increased. That's
24 led to a change in our contracts.

25 Q. Okay. Any other changes?

26 A. Not that I recall at this time.

27 Q. Is there still Cigarette Company gear in each of
28 the Cigarettes Cheaper stores in California?

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1 A. No.

2 Q. Tell me where you are in the close out. What
3 kind of inventory is on hand?

4 A. I think we have practically none.

5 Q. When did the closeout begin?

6 A. November of '98.

7 (Exhibit 5031 was marked for identification.)

8 BY MR. HULBURT:

9 Q. Exhibit 5031 is dated 5-4-99. It's Newsletter
10 63, Document PTS 135. Talking about exciting gear sale
11 news. Are you familiar with that document?

12 A. Yes.

13 Q. Was there some reduction in prices happening
14 here that is the exciting gear sale news?

15 A. Yes.

16 Q. What was the purpose of the reduction in price?

17 A. Get the gear out of the stores.

18 Q. How did you learn that you were supposed to get
19 the gear out of the stores?

20 MR. BERN: Objection; assumes facts not in the
21 record.

22 MR. FOSTER: Lacks foundation.

23 THE WITNESS: I think we paid for the gear. It
24 had been a long time since the only gear that hadn't
25 moved, and that we wanted to get it out of the store. It
26 was starting to look like clutter.

27 BY MR. HULBURT:

28 Q. Well, if the Master Settlement Agreement had not

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1 prevented it, would Cigarettes Cheaper have continued
2 selling gear?

3 MR. BERN: Objection; calls for speculation,
4 incomplete hypothetical.

5 MR. FOSTER: Join.

6 THE WITNESS: I don't know.

7 BY MR. HULBURT:

8 Q. Was there any plan to stop selling gear before
9 the Master Settlement Agreement?

10 A. No.

11 Q. With the Noble cigarettes, you include some
12 gifts with those products; is that right?

13 A. Yes.

14 Q. Noble is the one of the brands that is an
15 internal brand?

16 A. Yes.

17 Q. Is Noble sold under any other name anywhere
18 else?

19 A. No.

20 Q. So that particular blend of cigarette is
21 exclusive to the Noble name, which is exclusive to

22 Cigarettes Cheaper?
23 A. Yes.
24 Q. Is that true for all of the internal brands,
25 that -- that you have a unique blend which really is only
26 used by Cigarettes Cheaper, or are the same cigarettes
27 sold under a different name somewhere else?
28 MR. FOSTER: Lacks foundation.

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1 MR. BERN: Calls for speculation.
2 THE WITNESS: I believe that the Revenge
3 cigarettes are probably similar to the Bailey cigarettes.
4 That's the only situation that I can think of.
5 BY MR. HULBURT:

6 Q. Okay. So what are the various gifts that
7 Cigarettes Cheaper has given to customers with Noble
8 cigarettes?

9 A. A watch.

10 Q. Is that a wrist watch?

11 A. Yes.

12 Q. And describe it. What does it look like?

13 A. It's got a time piece with a leather wristband.
14 And it's got 12 markings around, and then two hands that
15 move around -- oh, there's -- I think there's a second
16 hand on it too.

17 Q. Does it somehow identify Noble cigarettes?

18 A. Yes. It says "Noble" on the face of the watch.

19 Q. And is there anything related to Cigarettes
20 Cheaper on it?

21 A. No.

22 Q. What is the purpose of giving customers a watch
23 when they buy Noble cigarettes?

24 A. To make the purchase of Noble memorable.

25 Q. Is that program continuing, that every time you
26 buy a pack of Noble cigarettes you get a watch?

27 A. No.

28 Q. Is that what it was? If you get a pack -- you

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1 buy a pack, you get a watch?

2 A. No.

3 Q. Was it carton?

4 A. Yes.

5 Q. Okay. Is that continuing?

6 A. Yes.

7 Q. Is that intended to continue indefinitely?

8 A. Yes.

9 Q. Are there any other gifts that Cigarettes
10 Cheaper has given to customers who buy Noble cigarettes?

11 A. No.

12 Q. Are there any gifts that Cigarettes Cheaper has
13 given to customers for any other brands?

14 A. Not that I recall.

15 Q. Are there plans to develop other gifts for the
16 Noble brand?

17 A. Yes.

18 Q. Like what?

19 A. A bobbin.

20 Q. A bobbin?

21 A. Yes.

22 Q. What's that?

23 A. It is an ashtray that won't spill ashes.

24 Q. Okay. Any other plan for gifts for Noble?

25 A. I believe that there is a camera.

26 Q. Anything else?

27 A. That's all I recall at this time.
28 Q. Do you have any concerns that Cigarettes Cheaper
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1 might be prevented from giving gifts with its cigarettes
2 sales, prevented by the Master Settlement Agreement?

3 A. No.
4 Q. Does Cigarettes Cheaper believe that the Master
5 Settlement Agreement applies to it?
6 MR. FOSTER: Objection. You're not permitted to
7 inquire into the -- his understanding of the Master
8 Settlement Agreement. The only appropriate subject for
9 the deposition is whether or not the conduct of this
10 retailer has changed coincident with the timing of the
11 Master Settlement Agreement. I'm going to instruct the
12 witness not to answer.

13 (Exhibit 5032 was marked for identification.)

14 BY MR. HULBURT:

15 Q. I'll show you Exhibit Number 5032, which is an
16 April 6, 2000 memo from John Roscoe, newsletter Number
17 102. Are you familiar with that?

18 A. Yes.

19 Q. On the -- on the second page in this memo -- let
20 me ask you first, did you have any role in writing this
21 memo, or is this all John Roscoe?

22 A. I believe that's all John Roscoe.

23 Q. All right. On the second page in the third
24 paragraph in italics he writes, "It's a new/old way to
25 sell cigarettes. It's something the American
26 manufacturers can't do because they sign the tobacco
27 settlement, which keeps them from giving gifts." Is it
28 the thought of Cigarettes Cheaper that you can do

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1 something that the tobacco companies cannot do?

2 MR. FOSTER: Objection; still calls for an
3 interpretation and their understanding of the Master
4 Settlement Agreement. And I'm going to instruct him not
5 to answer.

6 BY MR. HULBURT:

7 Q. In the first page of this memo -- and just for
8 the record this is PTS 198 and 199. On the first page in
9 the third paragraph he writes "We will retail Noble at
10 the same price as Marlboro even though Noble is a super
11 premium cigarette. Because we don't have years of
12 tobacco liability and the extravagant expenses of the
13 major tobacco companies, we can deliver these cigarettes
14 to the stores at costs lower than the costs of standard
15 American-made premium cigarettes." Can you explain to me
16 what the thought process here is of Cigarettes Cheaper
17 with respect to the effect of the years of tobacco
18 liability.

19 A. I believe that the document you've read speaks
20 for itself.

21 Q. Well, what does it speak to you?

22 A. It says, "We will retail Noble at the same price
23 as Marlboro, even though Noble is a super premium
24 cigarette. Because we don't have years of tobacco
25 liability and the extravagant expenses of the major
26 tobacco companies, we can deliver these cigarettes to the
27 stores at costs lower than the costs of standard
28 American-made premium cigarettes. Your Noble store cost

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1 will be about \$11" per -- "lower per carton than the
2 Marlboro cost per carton." It says more, but I'm going

3 to stop reading it there.
4 (Exhibit 5033 was marked for identification.)
5 BY MR. HULBURT:
6 Q. Exhibit 5033 is a memo from John Roscoe dated
7 May 12th, 2000. Newsletter Number 113. It's PTS 212 and
8 213. Are you familiar with that?
9 A. Yes.
10 Q. Did you write any of that, or just John Roscoe?
11 (Whereupon, Mr. Eaton entered the proceedings.)
12 THE WITNESS: I contributed the headline.
13 BY MR. HULBURT:
14 Q. "There is no present like the time"?
15 A. Yes.
16 Q. That's a reference to the watch?
17 A. Yes. Just like the time we're taking for this
18 deposition.
19 Q. Are Cigarettes Cheaper employees somehow
20 rewarded for gear sales?
21 A. Yes.
22 Q. In what way?
23 A. Managers and assistant managers are paid 20
24 percent of the operating profit. If we sell an item, we
25 realize the margin on that item. Margin contributes to
26 the profit of the store.
27 Q. Is there any special program or promotion or
28 award that a store or a salesperson can get by selling

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1 gear, other than increased commissions?
2 A. They can get their name on the list that you
3 have in your hand.
4 Q. There's a list of the top 25 gear sales. Is
5 that something that's recognized each month?
6 A. Yes.
7 Q. All right. Is there anything else that an
8 employee can get from gear sales?
9 A. Satisfaction of a job well done.
10 Q. Anything else?
11 A. That's all I recall at this time.
12 (Exhibit 5034 was marked for identification.)
13 BY MR. HULBURT:

14 Q. Exhibit 5034 is Document PTS 357 and 358. It's
15 entitled Star. What does that mean? What is -- is there
16 some sort of program, the Star program or something?
17 A. Inside the black rectangle in -- in brackets
18 there is the word "service." "Star Service." Star
19 Service are newsletters that my sister, Sally Baldwin,
20 puts out.
21 Q. To all the stores?
22 A. Yes.
23 Q. And what's the focus of the Star Service
24 newsletter?
25 A. Customer service and -- and product information.
26 Q. Okay. So this -- is this written by Sally
27 Baldwin?
28 A. Yes.

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1 Q. In the right-hand column under "Gear & Toy
2 Closeout," she writes "Make an effort to sell out" --
3 "sell out of your gear and toys." What is she referring
4 to with respect to toys?
5 A. My sister has for years been an aggressive
6 stuffed animal purchaser. When we opened the Cigarette
7 Cheaper stores and we sold the grocery stores, we still

8 had an inventory of -- of stuffed animals. We're
9 fortunate that many of our customers have grandchildren.
10

11 Q. So what kind of toys are stocked at Cigarette
12 Cheaper stores?

13 A. Stuffed animals.

14 Q. Stuffed animals unrelated to tobacco companies?

15 A. Completely unrelated.

16 Q. Are there stuffed animals that are also related
17 to tobacco companies?

18 A. Not that I know of. Well, related in that the
19 tobacco companies loathe the toys, and the fact that we
continue to sell them to customers.

20 Q. And even though you're closing out on tobacco
21 gear, will you continue selling the toys?

22 A. We're going to continue selling the toys until
23 we've seen -- seen the last of those stuffed animals.

24 Q. Are you purchasing stuffed animals, or are you
25 just selling --

26 A. I certainly hope not.

27 Q. You think you're just selling the inventory that
28 you have on hand?

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1 A. I certainly hope so.

2 (Whereupon, the following testimony is deemed
3 confidential material and subject to protective order
4 entered by the Superior Court of the County of Los
5 Angeles, State of California and is bound separately.)
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1 (Whereupon, this ends the testimony deemed
2 confidential and subject to protective order entered by
3 the Superior Court of the County of Los Angeles, State of
4 California.)
5 (Exhibit 5035 was marked for identification.)

6 BY MR. HULBURT:

7 Q. In this Exhibit 5035, which is Star Service
8 Special Edition, Document PTS 359 through 362, from Sally
9 Baldwin dated April 30th, 1999, she writes "Marlboro gear
10 is a tremendous opportunity for our stores." Why would
11 she say that?
12

13 MR. FOSTER: Objection; calls for speculation,
14 lacks foundation.

15 THE WITNESS: She wants to get it out of the
16 stores.

17 BY MR. HULBURT:

18 Q. Is that a true statement, that Marlboro gear is
19 a tremendous opportunity for the store?

20 A. Yes. Theoretically it is.

21 Q. In what way?

22 A. The merchandise -- the gear was usually of very
23 high quality. And the prices that were set on it were
24 usually set incredibly low. And if someone could
25 communicate that to customers, "Hey, look at the quality
26 and look at the price compared to what you would pay for
27 a comparable item someplace less," the margins for a
28 manager were tremendous. But as I expressed before, the

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1 wanted it for free.

2 (Exhibit 5036 was marked for identification.)

3 BY MR. HULBURT:

4 Q. Exhibit 5036 is Document PTS 742 entitled
5 "Marlboro 2000 Gear Program." Are you familiar with
6 that?

7 A. Yes.

8 Q. When did Cigarettes Cheaper receive that?

9 A. I don't recall.

10 Q. Can you tell whether it was in 1999 or 2000 or
11 some other year?

12 A. Yes.

13 Q. Can you tell me what year it was received.

14 A. I expect it was received in 1999.

15 Q. Does Cigarettes Cheaper stock Marlboro gear
16 catalogues?

17 A. No.

18 Q. Has it had any Marlboro gear catalogues?

19 A. No. Not -- not in the year 2000.

20 Q. How about in 1999?

21 A. Yes.

22 Q. Why -- why are there no Marlboro gear catalogues
23 in the year 2000?

24 MR. FOSTER: Objection; lacks foundation, calls
25 for speculation.

26 THE WITNESS: Because to get a gear catalogue in
27 the year 2000 you have to contact Marlboro directly. And
28 your information has to be verified by a third party.

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1 BY MR. HULBURT:

2 Q. You're talking about a customer calling Marlboro
3 directly?

4 A. Yes.

5 Q. Is there information in the Cigarettes Cheaper
6 store telling a customer how to get a Marlboro gear
7 catalogue?

8 A. Yes.

9 Q. What?

10 A. The materials that are listed on that document.

11 Q. Gear decals, gear flanges, gear laminated cards,
12 gear posters, gear stickers?

13 A. Yes.

14 Q. So are these placed on various locations on the
15 fixtures?

16 A. Yes.

17 Q. And are they in place in Cigarettes Cheaper

18 stores now?
19 A. I don't think so.
20 Q. Were they at some time?
21 A. Yes.
22 Q. When?
23 A. First quarter of 2000.
24 Q. And why are they not there now?
25 A. Three to four months later is longer than the --
26 the longevity of a sign.
27 Q. Have they been replaced with any other gear
28 promotional materials?

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1 A. Not that I recall. I haven't observed any.
2 Q. Does Cigarettes Cheaper participate in any
3 sweepstakes promotions for any of the tobacco companies
4 where a customer could sign up for a tobacco company
5 sweepstakes?
6 A. I don't know of any sweepstakes that are going
7 on at this time.
8 Q. How about in the last couple years?
9 A. Yes.
10 Q. Has it been the practice of Cigarettes Cheaper
11 to allow the tobacco companies to promote their
12 sweepstakes programs in the Cigarettes Cheaper stores?
13 A. Yes.
14 Q. Whenever they want to?
15 A. Yes.
16 Q. Has there ever been a sweepstakes program that
17 Cigarettes Cheaper has said, "No, you can't do that in
18 our store" ?
19 A. Not that I can recall.
20 Q. Has there ever been any signage that Cigarettes
21 Cheaper has rejected from a tobacco company because of
22 content?
23 A. Yes.
24 Q. What?
25 A. We refuse to put up any Joe Camel signs.
26 Q. When did you do that?
27 A. Probably starting in 19 -- at the inception of
28 the business. 1994.

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1 Q. Why?
2 A. We thought Joe Camel was stupid, thought it was
3 bad for the business.
4 Q. In what way?
5 A. From the very beginning we never liked the looks
6 of the Joe Camel character. We never thought it was
7 effective in moving the -- the Camel market share. And
8 we thought it -- it really irritated nonsmokers.
9 Q. Other than rejecting Joe Camel, has there been
10 any other rejection of tobacco company signage as a
11 result of the content?
12 A. Not that I recall at this time.
13 MR. FOSTER: Can we pause for a second.
14 MR. HULBURT: Uh-huh. Let's go off the record.
15 THE VIDEOGRAPHER: We are off the record. The
16 time is 1:56.
17 (Recess taken.)
18 THE VIDEOGRAPHER: We're back on the record.
19 The time is 2:04.
20 (Exhibit 5037 was marked for identification.)
21 BY MR. HULBURT:
22 Q. Exhibit 5037 is a letter dated May 19th, 2000

23 from Ross Webster of Philip Morris to John Roscoe
24 Cigarettes Cheaper. Are you familiar with that? Have
25 you seen that before?

26 A. Yes.

27 Q. Is Philip Morris thanking Cigarettes Cheaper for
28 agreeing to stop the sales of Marlboro gear; is that

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1 right?

2 A. Yes.

3 Q. And so I want to understand the conversations or
4 communications that preceded this. At some point did
5 Philip Morris contact Cigarettes Cheaper and say, "Hey,
6 you have to stop selling our gear"?

7 A. Yes.

8 Q. When was that?

9 A. In May of 2000.

10 Q. And how did that occur? Did Ross Webster call
11 and say "You got to stop selling gear," or did somebody
12 else from Philip Morris contact Cigarettes Cheaper?

13 A. Yes.

14 Q. What happened?

15 A. Don Cloney, who calls on us, asked us to stop
16 selling gear.

17 Q. Was he aware that Cigarettes Cheaper had been
18 selling gear continuously?

19 MR. FOSTER: Lacks foundation, calls for
20 speculation.

21 THE WITNESS: Yes.

22 BY MR. HULBURT:

23 Q. When was the last time that Cigarettes Cheaper
24 purchased gear?

25 A. I think you've asked that already.

26 Q. No, I don't think so.

27 A. It was prior to the Master Settlement Agreement.

28 Q. Okay. So you haven't purchased any since then?

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1 A. No.

2 Q. Did -- does Philip Morris know that you're
3 continuing to sell gear?

4 MR. FOSTER: Objection; lacks foundation, calls
5 for speculation.

6 MR. BERN: Join.

7 THE WITNESS: I don't know.

8 BY MR. HULBURT:

9 Q. Has Cigarettes Cheaper in any way communicated
10 to Philip Morris that Cigarettes Cheaper's plan is to
11 continue to sell the gear until it runs out of stock?

12 A. Yes.

13 Q. When was that communicated to Philip Morris?

14 A. I don't recall.

15 Q. Was it all part of this same communication that
16 is referred to in this May 19th, 2000 letter?

17 A. No.

18 Q. Give me your best estimate of when Cigarettes
19 Cheaper communicated to Philip Morris that you're going
20 to continue to sell the gear until it runs out.

21 A. I believe it was April of 1999.

22 Q. In May 2000 did Cigarettes Cheaper communicate
23 to Philip Morris that you would completely stop selling
24 gear?

25 A. No.

26 Q. Did you communicate to Philip Morris that you
27 would sell the gear until it runs out?

1 Q. Did you lead Philip Morris to believe that you
2 stopped selling gear?

3 MR. BERN: Objection; calls for speculation.

4 MR. FOSTER: Join.

5 THE WITNESS: No.

6 BY MR. HULBURT:

7 Q. This first sentence of this letter says, "I'm
8 writing to thank you for agreeing to stop the sale of
9 Marlboro branded merchandise, such as jackets and shirts
10 in your stores." Is that incorrect, that actually you
11 have not stopped the sale of Marlboro branded
12 merchandise?

13 MR. FOSTER: Objection; the question is compound
14 the way it's framed.

15 THE WITNESS: Chris, I want to thank you for
16 agreeing me that Jesse Ventura would be an excellent vice
17 presidential candidate. The answer -- the statements are
18 -- are similar. I don't recall that you did agree with
19 me that Jesse Ventura would be an excellent vice
20 presidential candidate. Yet I can go ahead and say
21 thanks for agreeing with me with the hope that we can
22 move the discussion along.

23 BY MR. HULBURT:

24 Q. The simple question is did -- simple question is
25 are you still selling Marlboro branded merchandise?

26 A. Yes.

27 Q. Did Cigarettes Cheaper agree with Philip Morris
28 in May 2000 to stop selling Marlboro branded merchandise?

1 A. Yes.

2 Q. Did Cigarettes Cheaper communicate to Philip
3 Morris in May 2000 that it would stop selling Marlboro
4 branded merchandise immediately?

5 A. No.

6 Q. And it did not communicate that it was going to
7 continue to sell it until you ran out?

8 A. That is correct. In the scheme of things sale
9 of gear is inconsequential.

10 MR. FOSTER: No question pending.

11 MR. EATON: But thank you for sharing
12 nonetheless.

13 BY MR. HULBURT:

14 Q. Has Philip Morris had any further communication
15 with Cigarettes Cheaper, since the May 19, 2000 letter,
16 related to the sale of gear at Cigarettes Cheaper stores?

17 A. No.

18 Q. Is there any doubt in your mind that Philip
19 Morris representatives are aware that you are continuing
20 to sell gear in the stores?

21 MR. FOSTER: Objection; calls for speculation,
22 lacks foundation.

23 MR. BERN: Join.

24 THE WITNESS: Yes.

25 BY MR. HULBURT:

26 Q. Yes, there is doubt?

27 A. Yes.

28 Q. Do the Philip Morris representatives visit the

1 stores?

2 A. Yes.

3 Q. With what frequency?

9 BY MR. HULBURT:

10 Q. This memo, which I'll mark as Exhibit 5038, is
11 to you from Terry Roberts at the Lorillard Company dated
12 May 11, 2000. It's Document PTS 628 and 629. Are you
13 familiar with that?

14 A. Yes.

15 Q. It's providing a Newport Continuity kit for use
16 in the Endless Pleasure Continuity Program. Can you
17 describe for me what that is.

18 A. Endless pleasures?

19 Q. The Endless Pleasures Continuity Program.

20 A. It is a catalogue and -- and call and buy
21 cigarettes, collect packaging, send it in, get stuff.

22 Q. And so what -- what is in the Cigarettes Cheaper
23 stores related to the Endless Pleasures Continuity
24 Program?

25 A. Why the items that are checked next to the -- on
26 the second page.

27 Q. Caddy brochure holder, continuity program
28 brochures, and laminated card with chain?

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1 A. Yes.

2 Q. Anything else?

3 A. I believe that's it. Okay. Go ahead. Rip my
4 fingernails out. Just don't ask me any more gear
5 questions. Nobody cares about gear.

6 Q. Does Cigarettes Cheaper stock any Lorillard
7 gear?

8 A. No.

9 Q. Has it ever?

10 A. No.

11 Q. Has it only stocked Philip Morris gear?

12 A. Yes.

13 Q. Did Cigarettes Cheaper participate in Eclipse
14 test marketing?

15 A. No.

16 Q. Or Premier?

17 A. No.

18 (Interruption in proceedings.)

19 THE VIDEOGRAPHER: Excuse me, Counsel, when the
20 telephone is going off, it ruins the audio. Okay.

21 THE WITNESS: It was the intruder again.

22 BY MR. HULBURT:

23 Q. Were you offered those promotions?

24 A. No.

25 Q. Okay. Has Cigarettes Cheaper had any
26 communication with any of the tobacco companies with
27 respect to the subject of a less smoke cigarette?

28 A. Yes.

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1 Q. Tell me about that.

2 A. When RJR made the -- the announcement in April
3 of 2000, Wayne Tucker, the regional vice president for
4 R.J. Reynolds, called me and read me a script that was
5 essentially the same as the information that was released
6 to the press.

7 Q. Have you had any other communication with any
8 tobacco companies on that subject?

9 A. Yes.

10 Q. What?

11 A. I asked Rich Pettorini from R.J. Reynolds last
12 week how it was going. And he told me that practically
13 no one was buying it.

14 Q. Have you had any other communications on that
15 subject?
16 A. Yes.
17 Q. What?
18 A. A customer came up to Art Smoot, one of our
19 programmers at a trade show, and asked if we sold Eclipse
20 cigarettes.
21 Q. Okay. Anything further?
22 A. No.
23 Q. What is this in general? Just describe for me
24 the -- I've seen these on many different brands. And is
25 this a Cigarettes Cheaper document?
26 MR. FOSTER: We're talking about PTS 725.
27 MR. HULBURT: 725 through 727.
28 ////

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1 BY MR. HULBURT:
2 Q. Is that a Cigarettes Cheaper document?
3 A. Well, Cigarettes Cheaper has a copy of that
4 document. But Philip Morris produced that document.
5 Q. Okay. It's entitled "Retail promotion facts
6 sheet." Is this something that is unique to Philip
7 Morris in your dealings with the tobacco companies?
8 A. That is a distinctly Philip Morris document.
9 Q. All right. And what's its purpose as you
10 understand it?
11 A. To give the facts relating to a retail
12 promotion.
13 Q. And so do you receive one of these for each
14 brand?
15 A. No.
16 Q. For each brand for which there is a promotion
17 ongoing?
18 A. No.
19 Q. How are these used by Cigarettes Cheaper?
20 A. When we get them, we check to make sure that we
21 have the UPC code and the pack set up so that it will
22 ring up at the right price in the store, that our
23 invoicing will be correct. And that we are getting the
24 promotion in the right way. The two attorneys from
25 Philip Morris should take note that we ought to get them
26 every time. And it's difficult to get them.
27 Q. Are these retail promotion fact sheets the
28 result of a buy-down program?

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1 A. No.
2 Q. They're a result of a display agreement?
3 A. No.
4 Q. What -- what promotions are they referring to?
5 A. Well, they refer to a variety of different ones.
6 Each is -- is on its own. The document speaks for
7 itself.
8 Q. When Cigarettes Cheaper participates in a
9 buy-down agreement, is that a reduction in the price to
10 Cigarettes Cheaper, or is that a payment made?
11 A. It is a -- the way it is phrased, it is a
12 difficult question. Let me take a stab at it in the
13 interest of time. In the case of GPC, the price is
14 reduced that we pay to McClane. In the case of Marlboro,
15 a payment is made following the completion of an
16 accounting period.
17 (Exhibit 5039 was marked for identification.)
18 BY MR. HULBURT:

19 Q. Exhibit 5039 is a letter dated October 13th,
20 1999. Document PTS 1029 from Fran Munoz to you saying
21 "It was a pleasure meeting my Number 1 customer,
22 Cigarettes Cheaper, yesterday. I'm excited to be here
23 and look forward to working with you." Is -- is that
24 salesman talk, or is Cigarettes Cheaper the Number 1
25 customer of Philip Morris for some districts?
26 MR. BERN: Objection; calls for speculation.
27 MR. FOSTER: Lacks foundation.
28 MR. EATON: Join.

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1 THE WITNESS: I've had no further contact with
2 Fran Munoz since that letter.

3 BY MR. HULBURT:

4 Q. All right. Is -- do you know where Cigarettes
5 Cheaper is in the hierarchy of being a Number 1 customer
6 for Philip Morris for any regions or districts or --

7 A. Yes.

8 MR. FOSTER: Calls for speculation, lacks
9 foundation.

10 BY MR. HULBURT:

11 Q. Tell me.

12 A. Cigarettes Cheaper is how cigarettes should be
13 sold. It's the only retailer that executes the programs
14 correctly and treats the product and the customers with
15 respect. So in that respect we are the Number 1 retailer
16 in the country every place where we operate stores. On
17 the other hand, our relations with Philip Morris are
18 dysfunctional.

19 Q. Is Cigarettes Cheaper the Number 1 volume
20 customer of Philip Morris?

21 A. I don't know.

22 MR. FOSTER: Calls for speculation, lacks
23 foundation.

24 BY MR. HULBURT:

25 Q. You think you're probably not?

26 A. Yes.

27 (Exhibit 5040 was marked for identification.)

28 ////

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1 BY MR. HULBURT:

2 Q. Exhibit 5040, we'll use three pages. PTS 1053,
3 1054 and 1055. Which are three letters from various
4 executives at Philip Morris Company. I think all
5 addressed to John Roscoe. Mr. and Mrs. John Roscoe or
6 John Roscoe. Congratulating on the five-year anniversary
7 of Cigarettes Cheaper. Are you familiar with those?

8 A. Yes.

9 Q. Did Philip Morris -- other than send these
10 congratulatory letters, did Philip Morris do anything
11 else to recognize the five-year anniversary of Cigarettes
12 Cheaper?

13 MR. BERN: Calls for speculation.

14 THE WITNESS: Yes.

15 BY MR. HULBURT:

16 Q. What?

17 A. Don Cloney came to our office and said
18 "Congratulations. Happy anniversary." Let the record
19 show I said that Don Cloney is a great guy.

20 Q. What is the Philip Morris invitational? Are you
21 familiar with that?

22 A. Yes.

23 Q. What is that?

24 A. It's a big waste of money.
25 Q. What is it?
26 A. It is a golf and tennis outing that Philip
27 Morris invites distributors and retailers to in Florida
28 in the first quarter of the year.

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1 Q. And has it been the practice of Cigarettes
2 Cheaper to attend?
3 A. It was.
4 Q. During what years?
5 A. Probably for a five-year period from '94 to '99.
6 (Exhibit 5041 was marked for identification.)

7 BY MR. HULBURT:

8 Q. Exhibit 5041 is a letter dated February 7th,
9 2000 from Michael Szymanczyk, president and C.E.O. of
10 Philip Morris, to John Roscoe. "Thanks very much for
11 taking the time to have dinner with me Wednesday night."
12 Are you familiar with that meeting?

13 A. Yes.

14 Q. Where was that?

15 A. San Francisco.

16 Q. Can you tell me what the purpose of the meeting
17 was between your father and Mr. Szymanczyk.

18 MR. FOSTER: Lacks foundation, calls for
19 speculation.

20 THE WITNESS: The purpose was to have dinner.

21 BY MR. HULBURT:

22 Q. Was that part of some ongoing business
23 discussion or negotiation or dealing?

24 MR. FOSTER: Objection; calls for speculation
25 and lacks foundation.

26 THE WITNESS: Yes.

27 BY MR. HULBURT:

28 Q. Were you present?

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1 A. No.
2 Q. Was it just John Roscoe and Mr. Szymanczyk?
3 A. No.
4 Q. Who else was there?
5 A. Marilyn Roscoe and the people that work at the
6 restaurant. And the other patrons.

7 Q. Anyone else on behalf of Cigarettes Cheaper?

8 A. No.

9 Q. In the first paragraph Mr. Szymanczyk says, "I
10 appreciate your direct feedback. I hope you understand I
11 was seeking your thoughts on these subjects, not
12 attempting to convince you my point of view is right or
13 yours is wrong." Do you know what he's referring to
14 there?

15 A. Yes.

16 MR. FOSTER: Objection; calls for speculation
17 and lacks foundation.

18 BY MR. HULBURT:

19 Q. Have you talked with your father about the
20 meeting that he had with Mr. Szymanczyk?

21 A. Yes.

22 Q. And have you talked with your father about this
23 letter?

24 A. Yes.

25 Q. What's your understanding of what Mr. Szymanczyk
26 is referring to in that first paragraph?

27 MR. FOSTER: Calls for speculation, lacks
28 foundation.

1 THE WITNESS: There was a complete disagreement
 2 about virtually everything concerning the tobacco
 3 business between my father and Michael Szymanczyk.

4 BY MR. HULBURT:

5 Q. Like what? Give me some examples of the issues
 6 that were discussed.

7 MR. FOSTER: Calls for speculation and lacks
 8 foundation.

9 THE WITNESS: Sales to minors was one topic.
 10 Mike Szymanczyk expressed what a high priority it was to
 11 avoid the sale to minors and how he had people working on
 12 it, and that they were -- it was one of their key
 13 cooperate goals to make sure that sales to minors would
 14 be stopped and -- and wouldn't happen.

15 BY MR. HULBURT:

16 Q. And Cigarettes Cheaper had previously proposed a
 17 solution to the sales to minor problem?

18 A. Yes.

19 Q. Is it your understanding that that was discussed
 20 at this dinner?

21 MR. FOSTER: Calls for speculation.

22 THE WITNESS: No.

23 BY MR. HULBURT:

24 Q. What's your understanding of the disagreement
 25 between your father and Mr. Szymanczyk on the subject of
 26 sales to minors?

27 MR. FOSTER: Objection; lacks foundation, calls
 28 for speculation.

1 THE WITNESS: John Roscoe said that every time
 2 one of those ads came on the TV that said "We're from
 3 Philip Morris and we don't want minors to purchase
 4 cigarettes," that the typical viewer says "Those lying
 5 sons of bitches. They're lying again." The ads were --
 6 did more harm than good. That it was a big waste of
 7 money and a stupid thing to do.

8 BY MR. HULBURT:

9 Q. And was there any discussion regarding John
 10 Roscoe's proposal?

11 MR. FOSTER: Objection; calls for speculation
 12 and lacks foundation.

13 THE WITNESS: I doubt it.

14 BY MR. HULBURT:

15 Q. What else did they discuss?

16 MR. FOSTER: Objection; calls for speculation
 17 and lacks foundation.

18 THE WITNESS: Proposition 28.

19 BY MR. HULBURT:

20 Q. Okay. What else?

21 MR. FOSTER: Can I have just have a running
 22 objection --

23 MR. HULBURT: Yeah.

24 MR. FOSTER: -- to this meeting that you're
 25 asking about --

26 MR. HULBURT: Yes.

27 MR. FOSTER: -- that he didn't attend.

28 MR. HULBURT: Yes. Yes.

1 BY MR. HULBURT:

2 Q. My understanding that you're relaying this
 3 information based on conversation you had with your
 4 father, John Roscoe; is that true?

5 A. That's correct.
6 Q. Okay. So based on that, what else did they
7 discuss?
8 A. They discussed the buy-down programs.
9 Q. In what way?
10 A. My father said the programs, the way they
11 conduct it is stupid. Mike Szymanczyk disagreed with
12 him.
13 Q. So a disagreement about the pulse pricing?
14 A. Yes.
15 Q. Okay. What else did they discuss?
16 A. Mike Szymanczyk talked about their high-level
17 research that they have into how the -- what the
18 customers think and what the nation believes about
19 cigarettes. My father countered that all of that was
20 garbage, and that it was a complete waste of money.
21 Q. Why?
22 A. As my father relayed to me, Mike pretty much
23 gave him a lecture in consultant talk of psychographics
24 and demographics and the stuff that Yanklovich and other
25 consultants had done for them. And with the idea that
26 Mike had a better understanding of what was actually
27 going on in the market than -- than Cigarettes Cheaper
28 did. And that the stupid things they were doing were

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1 justified.

2 Q. What else did they discuss?
3 A. I think my father expressed his dissatisfaction
4 with the way Mike was doing his work and the conduct of
5 Philip Morris.

6 Q. Anything else?

7 A. That's all I recall.

8 (Exhibit 5042 was marked for identification.)

9 BY MR. HULBURT:

10 Q. Exhibit 5042 is a July 26th, 1999 letter from
11 you to the Brown & Williamson legal department. Is that
12 your signature?

13 A. Yes.

14 Q. Okay.

15 A. This was a letter you were getting huffy about
16 earlier today that you didn't have a copy of.

17 Q. No. This is not the agreement.

18 A. Oh, I see.

19 Q. I don't have any agreements. This is the letter
20 that told me that there's something out there that I've
21 not ever seen.

22 A. Okay.

23 Q. This is a letter that you wrote to Brown &
24 Williamson saying basically we wanted indemnification
25 back from you?

26 A. Yes.

27 Q. All right. And did you receive it?

28 A. Yes.

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1 Q. And this letter says that you enclosed a letter
2 from another company. What company's letter was
3 enclosed?

4 A. Philip Morris.

5 Q. And so you have a Philip Morris -- written
6 agreement where Philip Morris has agreed to indemnify
7 Cigarettes Cheaper for any liability related to its --
8 the sale of its products?

9 A. Would you please clarify the question.

10 Q. Which part of it?
11 A. "You." You used the word "you."
12 Q. Cigarettes Cheaper.
13 A. No.
14 MR. FOSTER: I need to have the question read
15 back anyway, unless you want to rephrase it.
16 MR. HULBURT: I'll ask it again.
17 BY MR. HULBURT:
18 Q. Is there a written agreement between Cigarettes
19 Cheaper and Philip Morris that Philip Morris will
20 indemnify Cigarettes Cheaper for any liability related to
21 the sale of the Philip Morris products?
22 A. Yes.
23 MR. FOSTER: I'm going to object; that calls for
24 a legal conclusion.
25 THE VIDEOGRAPHER: Excuse me, Counsel. I need
26 to do a tape change in about two minutes.
27 MR. HULBURT: Okay. Let's go off the record.
28 THE VIDEOGRAPHER: We're off the record. This

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1 concludes Tape 2 of the deposition. And the time is
2 2:32.

3 (Discussion off the record.)

4 THE VIDEOGRAPHER: We're back on the record.
5 This begins Tape 3 of the deposition of Ned Roscoe. And
6 the time is 2:34.

7 BY MR. HULBURT:

8 Q. This letter, Exhibit 5042, says in the first
9 sentence, "We are the third largest retailer in the
10 United States." What are you referring to there? Third
11 largest in what way?

12 A. Number of cigarettes sold.

13 Q. All brands?

14 A. Yes.

15 Q. Who are the first and second?

16 A. Wal-Mart and 7-Eleven.

17 Q. I -- I know I asked you this already, but did
18 you get an indemnification letter back from Brown &
19 Williamson in response to this letter?

20 A. Yes.

21 (Exhibit 5043 was marked for identification.)

22 BY MR. HULBURT:

23 Q. Okay. Exhibit 5043 is a copy from a Tobacco
24 Control journal that you produced. It's from the autumn
25 1997 issue, Volume 6, Number 3. Pages 236 through 239.
26 They're documents PTS 1317 through 1320. We spoke about
27 this a little bit earlier. This is the article regarding
28 a memo explaining a worldwide strategy to create and keep

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1 alive a controversy regarding the health effects of
2 secondhand smoke. Is this an article that you've read?

3 A. Just -- I just have looked at it right now.

4 Q. Have you ever looked at it before?

5 A. I don't recall.

6 Q. Do you recall reading -- at some time before
7 reading an article in Tobacco Control or anywhere else
8 that described a Philip Morris worldwide strategy of
9 creating and keeping alive a controversy regarding the
10 health effects of secondhand smoke?

11 A. I recall a general news story that was in the
12 last three or four months about -- relating to the World
13 Health Organization. I don't -- don't recall this, and I
14 don't recall anything particular to Brown & Williamson.

15 Q. I'm talking about Philip Morris.
16 A. I -- I don't recall any of the specifics.
17 Q. Cigarettes Cheaper obviously never published in
18 its newsletter for its customers any of the information
19 about a tobacco company worldwide strategy of creating a
20 controversy about secondhand smoke; is that correct?
21 A. No.
22 Q. Is what I said --
23 A. Not that I --
24 Q. Is what I said correct?
25 A. I don't recall that we published anything about
26 a tobacco company -- the -- in the general media there's
27 been enough attention about the strange statistical
28 methods used in the EPA study that I don't think even

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1 require the tobacco companies to participate in the
2 debate.

3 Q. You don't think the tobacco companies got to
4 participate in the ET -- EPA process?

5 MR. FOSTER: Objection; calls for speculation,
6 lacks foundation. It's pretty much off the subject.

7 MR. HULBURT: Actually, it's directly on the
8 subject, because it's information that he has published
9 to his customers. And so whether or not he's got the
10 information correct.

11 MR. FOSTER: I don't think he said he
12 published --

13 MR. HULBURT: Yeah, he did.

14 MR. FOSTER: -- that --

15 MR. HULBURT: He did this morning when you
16 weren't here. As in one of the newsletters.

17 MR. FOSTER: Okay.

18 THE WITNESS: I recall from -- from things that
19 were written by scientists that I don't think have any
20 connection to the tobacco companies, the strange
21 statistics that were used by the EPA in their Meta survey
22 to document adverse health effects of secondhand smoke.
23 And I think that that was a general thing in the general
24 media. I'll bet if you go through Rush Limbaugh, Rush
25 Limbaugh has talked about how -- how weird it was. I
26 don't think Rush Limbaugh gets paid off by the tobacco
27 companies.

28 Q. I would probably not go back to Rush Limbaugh.

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1 A. No question is pending, but this whole thing is
2 about something that is widely known. Why don't we have
3 signs that say "breathe air" people might forget?

4 Q. In these Tobacco Control journals which you
5 subscribe to and read occasionally, there are numerous
6 articles regarding the health effects of environmental
7 tobacco smoke, exposure to children, exposure to adults
8 and other issues related to the health effects of
9 secondhand smoke. Am I correct that Cigarettes Cheaper
10 has never chosen to publish any of the information from
11 any of these articles in any of the Cigarettes Cheaper
12 newsletters?

13 A. Yes.

14 Q. And your reason for that is what?

15 A. We've asked and answered this. I guess there's
16 an infinite number of reasons why the things that aren't
17 said by -- by an organization aren't said. Just because
18 we didn't choose to. We chose to do other things.

19 Q. Well, I'm trying to understand why you chose to

20 publish information regarding criticisms of the
21 conclusions but you've not chosen to publish any of the
22 information regarding the studies and conclusions that
23 show health effects.

24 A. We've been through this before. As I said,
25 general -- it's generally well known by very small
26 children up to -- to senior citizens in all parts of the
27 population across ethnic groups that secondhand smoke is
28 deadly.

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1 Q. What do you base that on?

2 A. I have a six-year-old.

3 MR. FOSTER: Let him -- let him finish his
4 answer.

5 THE WITNESS: My six-year-old comes home, and
6 he's been through two propaganda sessions in kindergarten
7 and in first grade about this, that I'm sure just -- that
8 it's one of those things that everybody knows. Like I
9 said this morning, if you say the things that everybody
10 knows, that's boring. People don't want to read it. It
11 doesn't help us serve our customers any better to say the
12 thing everybody knows. It's only interesting if you say
13 something that might not be -- be common.

14 And I -- there's been enough discussion by the
15 general media that -- that what's generally accepted is
16 questionable. That it was newsworthy to us. We don't
17 sell the news from Cheaper. We give it away. So I don't
18 really know whether, as an editor -- editor, that was a
19 good decision, what kind of readership we actually had on
20 it or not. It's just my feeling is the right in
21 listening to people. It's like the old thing about dog
22 bites man. That's not news. You haven't asked me if
23 I've discussed this deposition with anyone.

24 MR. EATON: Would you like to volunteer any
25 other topics while we're here? We could order breakfast
26 in.

27 THE WITNESS: Move to strike his comment there.

28 MR. HULBURT: Okay. I have nothing further.

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1 MR. FOSTER: Thank you. I have no questions for
2 the witness.

3 MR. BERN: I have no questions.

4 MR. EATON: No questions.

5 MR. FOSTER: Usual stipulation.

6 MR. HULBURT: I'm sure we have the same
7 stipulation.

8 THE VIDEOGRAPHER: We are off the record. This
9 concludes the deposition of Ned Roscoe. And the time is
10 2:45.

11 (Whereupon, at 2:45 p.m. the deposition
12 concluded.)

13

* * * * *

14
15 I hereby declare under penalty of perjury
16 that the foregoing deposition is my deposition under
17 oath; that these are the questions asked of me and my
18 answers thereto; that I have read my deposition and have
19 made the necessary corrections, additions or changes to
20 my answers that I deem necessary.

21
22 IN WITNESS THEREOF, I hereby subscribe my
23 name, this _____ day of _____ 2000.

25
26
27
28

NED F. ROSCOE

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